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Supreme Court, U.S.
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No. 96-710

In The

Supreme Court of the United States

OCTOBER TERM, 1996

MICHAEL SULLIVAN, et al.,

Petitioners,

v.

SYLVESTER SASNETT, et al.,

Respondents,

and

UNITED STATES OF AMERICA,

Intervenor-Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

*FRANK D. REMINGTON
JOHN S. GREENE
Assistant Attorneys General
**Counsel of Record*

JAMES E. DOYLE
Attorney General
Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3542
Attorneys for Petitioner

12 pp

QUESTION PRESENTED

1. Whether Congress acted beyond the scope of its power under Section 5 of the Fourteenth Amendment, and violated the Separation of Powers Doctrine, when it enacted the Religious Freedom Restoration Act, 42 U.S.C. §2000bb (1993).

PARTIES TO PROCEEDING

Petitioners:

Michael J. Sullivan, Secretary, Department of Corrections

Ken Sondalle, Administrator, Division of Adult Institutions

Jeffrey Endicott, Warden, Columbia Correctional Institution

Gary McCaughtry, Warden, Waupun Correctional Institution

Gerald Berge, Warden, Fox Lake Correctional Institution

Kristine Krenke, Warden, Taycheedah Correctional Institution

Respondents:

Sylvester Sasnett
Lonnie Smith
James Lowery
James Hadley
Barbara Miller

Intervenor-Respondent:

United States of America

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On Petition for Writ of Certiorari to the
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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Sasnett v. Department of Corrections, 891 F. Supp. 1305 (W.D. Wis. 1995) and Sasnett v. Sullivan, 908 F. Supp. 1429 (W.D. Wis. 1995) are reprinted in the Appendix, infra, at A59-A90 and A15-A58, and the decision of the Seventh Circuit, Sasnett v. Sullivan, 91 F.3d 1018 (7th Cir. 1996) is reprinted in the Appendix at A1-A10.

JURISDICTION

The Seventh Circuit issued its decision on August 2, 1996. This Court has jurisdiction under 28 U.S.C. §1254 (1994).

STATUTES INVOLVED

Religious Freedom Restoration Act, 42 U.S.C. §2000bb1-4 (1993), reprinted in the Appendix, *infra*, at A91-A95.

STATEMENT OF THE CASE

On December 20, 1993, Sylvester Sasnett, an inmate in the Wisconsin Correctional System, filed this action in state court pursuant to 42 U.S.C. §1983 alleging that changes in prison property rules violated his rights under the First and Fourteenth Amendments in several respects, including denial of his right to the free exercise of religion.

The rules which the plaintiff challenged barred him from possessing jewelry even thought it had religious significance. These rules prohibited jewelry in the prison because gang members sometimes wear jewelry -- e.g. earrings, pins, crosses, crucifixes and medallions -- to show particular gang affiliations. Prison officials believed that there was no way to distinguish readily between jewelry worn as a symbol of religious belief and jewelry worn to signify gang affiliation. To avoid discrimination against any particular religion that used as a symbol of its faith a symbol also used for gang identification, prison officials decided that all jewelry should be disallowed. This policy was also supported by the fact that jewelry is a potentially expensive item that can be used in bartering and strong arming, and can foster false claims of loss or theft.

The petitioners (hereafter "defendants"), various prison officials, removed this case to the United States District Court for the Western District of Wisconsin. On August 12, 1994, the district court granted plaintiff's motions to amend the complaint which, in addition to adding other parties, added new claims under the Religious Freedom Restoration Act ("RFRA"), Pub. L. No. 103-141, 107 Stat. 1488 (1993), codified at 42 U.S.C. §2000bb.

On December 19, 1994, the defendants moved for partial dismissal of plaintiffs' case arguing, among other things, that RFRA is unconstitutional. On June 26, 1995, the district court denied the defendants' motion challenging the constitutionality of RFRA and upheld the law. Sasnett, 891 F. Supp 1305.

The defendants moved for summary judgment on the remaining issues, including whether plaintiffs had been "substantially burdened" by the challenged regulations within the meaning of RFRA. In the alternative, the defendants argued that even if plaintiffs could demonstrate a substantial burden, the challenged policies were the least restrictive means of accomplishing their compelling purposes and thus did not violate RFRA.

On December 1, 1995, the district court concluded that the state's prohibition on inmate jewelry violated RFRA, and enjoined further application of the jewelry policy to inmates who demonstrate sincere religious motivation for wearing jewelry. The district court found that the prison rule did not violate the First Amendment.

The Seventh Circuit Court of Appeals affirmed the decision of the district court, concluding that RFRA was constitutional.

REASONS FOR GRANTING THE WRIT

On October 15, 1996, this Court granted a petition for writ of certiorari by the City of Boerne, Texas in City of Boerne v. Flores, Case No. 95-2074. The issue in this case is the same issue as this Court accepted in Flores: whether RFRA is constitutional.[1]

Because the issue is the same as in Flores, the petitioners here request that this petition for writ of certiorari be considered in light of any decision of this Court in the Flores case. The following argument for granting this petition borrows heavily from that given in Flores, but is repeated here for respondents' benefit and for the sake of completeness.[2]

In short, the Religious Freedom Restoration Act requires government to accommodate religious conduct more than the Supreme Court has declared that the Constitution requires. RFRA violates the Constitution because Congress exceeded its power under section 5 of the Fourteenth Amendment and because by legislating a legal standard that this Court has expressly rejected, Congress violated the Separation of Powers Doctrine.

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[1] The Flores case differs from this one only in that the petitioner there identifies two additional constitutional provisions that arguably invalidate RFRA: the Tenth Amendment and the Establishment Clause.

[2] The petitioners recognize and credit Marci A. Hamilton, petitioner's counsel in Flores, for her assistance with formulating the arguments contained in this petition.

I. THE SCOPE OF CONGRESSIONAL POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT SHOULD BE SETTLED BY THIS COURT

This case presents the same question of congressional power under Section 5 of the Fourteenth Amendment that was presented to this Court in Flores. Specifically, the petitioners here assert that Congress exceeded its power under Section 5 of the Fourteenth Amendment when it enacted RFRA.

The Supreme Court bears responsibility for delineating the constitutional scope of congressional power to legislate. See U.S. v. Lopez, 115 S. Ct. 1624 (1995) (Kennedy, J., concurring).

> While the presumption of constitutionality is due to any act of a coordinate branch of the Federal Government or of one of the States, it is this Court which is ultimately responsible for deciding challenges to the exercise of power by those entities.

City of Rome v. United States, 446 U.S. 156, 207 (1980) (Rehnquist, J., dissenting).

This Court has examined the question of the scope of congressional power in New York v. United States, 505 U.S. 144 (1992); Gregory v. Ashcroft, 501 U.S. 452 (1991); Lopez, 115 S. Ct. 1624; Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995); and Seminole Tribe of Fla. v. Florida, 116 S. Ct. 1114 (1996). By extrapolation, these cases support a holding that RFRA exceeds Congress' constitutional authority. However, this Court has not directly considered or articulated the full extent of Congress' power under Section 5.

RFRA was passed by Congress solely on the premise that Katzenbach v. Morgan, 384 U.S. 641 (1966), authorizes Congress unilaterally to expand the scope of incorporated rights against the states. See Keeler v. Mayor of Cumberland, No. Civ. A. S-96-167, 1996 WL 311701 at *4 (D. Md. June 10, 1996).

Morgan arguably stands for two propositions; first, Congress may provide remedies for constitutional infractions by the states. Morgan, 384 U.S. at 648. This principle follows directly from the language of Section 5, which states that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." This remedial power may also be read to imply that Congress may -- if necessary -- enact prophylactic legislation demanding more than the Constitution requires where state and local governments have proved recalcitrant to the requirements of the Constitution. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989). At most, Congress' prophylactic power could permit Congress to exercise its legislative factfinding capacity to determine that the state and local governments have proved recalcitrant to the Constitution and to institute means of bringing them back within the constitutional fold. However, "[t]he enactment of RFRA can in no sense be said to involve the 'specially informed legislative competence' of Congress." Keeler, 1996 WL 311701, at *11. In fact, "Congress abdicated its responsibility to investigate the particular state action which might have the potential of unconstitutionally burdening the free exercise of religion." Hamilton v. Schriro, 74 F.3d 1545, 1567 (8th Cir. 1996) (McMillian, J., dissenting).

Neither the legislative history of RFRA nor any other identified source supports the position that state and local governments persistently and intentionally have refused to abide by the constitutional standard as set out in either Employment Div., Dept. of Human Res. v. Smith, 494 U.S. 872 (1990) or the pre-Smith case law. The RFRA

legislative history is replete with harsh criticism of Smith and contains only few anecdotal reports of religious suppression. RFRA is not a constitutionally legitimate prophylactic measure; rather, it is an extreme overenforcement of Section 5. See Hamilton, 74 F.3d at 1570 (McMillian, J., dissenting) ("This is not prophylaxis but unconstitutional interbranch hegemony.") RFRA is an aggrandizement of congressional power over and against the Supreme Court and in derogation of the states. This Court's "cases are quite clear that there are real limits to federal power." Lopez, 115 S. Ct. at 1642 (Thomas, J., concurring).

The Morgan decision's second rationale, the "ratchet theory," would permit Congress to expand but not contract Fourteenth Amendment rights. Morgan, 384 U.S. at 651 n. 10. The United States in both the district court and appellate court expressly disavowed this second rationale as a basis for enacting or supporting RFRA. Perhaps this concession is wise for the ratchet theory violates separation of powers principles in that it permits Congress to overtake the core judicial function to declare "what the law is," as set forth in Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803). It was rightly and roundly criticized by Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor in EEOC v. Wyoming, 460 U.S. 226 (1983) (Burger, C.J., dissenting), who stated that "[a]llowing Congress to protect constitutional rights statutorily that it has independently defined fundamentally alters our scheme of government." Id. at 262. Far from being vindicated, the ratchet theory was laid to rest in Oregon v. Mitchell, 400 U.S. 112 (1970), which demarcated "a limitation on the extent to which Congress may substitute its own judgment for that of the states and assume this Court's 'role of final arbiter.'" Wyoming, 460 U.S. at 262; See also D.O. Conkle, The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute, 56 Mont. L. Rev. 39, 52 n. 14

(1995) ("Morgan's theory of substantive congressional power must be regarded as suspect.").

This Court should grant certiorari in this case to delineate the constitutional limits on Congress' exercise of its Section 5 authority.

II. THE SEVENTH CIRCUIT'S DECISION UPHOLDING RFRA CONFLICTS WITH THIS COURT'S SEPARATION OF POWERS DOCTRINE

The enactment of RFRA not only exceeded Congress' power under Section 5 of the Fourteenth Amendment, but also violated the Separation of Powers Doctrine. By legislating a legal standard that this Court has expressly rejected, Congress has invaded the province of the Court. Even if there existed a free exercise problem demanding Congressional action, Congress cannot create a remedy that this Court has previously rejected. In enacting RFRA, Congress not only imposed a legal standard on the courts that this Court has already rejected, but it gave the courts a job that this Court stated it did not feel competent to perform. See In re Tessier, 190 B.R. 396 (Bankr. D. Mont. 1995).

In 1990, this Court addressed the extent to which the Free Exercise Clause of the First Amendment requires governments to accommodate religious conduct in conflict with neutral, generally applicable laws. See Smith, 494 U.S. 872. In that opinion, the Court declared that the Free Exercise Clause does not require government to grant an individual exemption for the religious adherent if the state has enacted a neutral, nondiscriminatory, generally applicable law. Smith, 494 U.S. at 885. As noted by one scholar:

> Smith is not merely a decision in which the Court chose to abandon the compelling

> interest test as the standard for enforcing the constitutional guarantee of free exercise. Smith questions the institutional competence of the judiciary and sets forth the vision of a majority of the Court regarding the limits of the judicial function. Because Smith represents the Court's reasonable (although not fully articulated) refusal to undertake the task of balancing religious liberties against neutral government regulations, Congress cannot override that refusal through ordinary legislation.

Brant, Taking the Supreme Court at its Word: The Implications for RFRA and Separation of Powers, 56 Mont. L. Rev. 5, 6 (1995).

There is no precedent for Congress' attempt to "deny the Supreme Court's determination of its own capacity to adjudicate . . . ." Tessier, 1995 WL 736461 at 9. "Nothing in Morgan suggested that the Court should defer to Congress in the process of deriving the applicable legal standard from the [constitutional text] and other sources of law; the opinion seemed to require Congress to apply the same standard as the Court, merely leaving it free to apply the standard differently where the application turned upon 'questions of fact.'" A. Cox, The Role of Congress in Constitutional Determinations, 40 U. Cin. L. Rev. 199, 234 (1971) (emphasis in original). In particular, the Court did not permit Congress to adopt a standard of constitutional scrutiny that differed from that which the Court would itself employ. Conkle, 56 Mont. L. Rev. at 49-50.

Article III provides that "[t]he judicial power of the United States, shall be vested in one supreme court . . . ." U.S. Const. art. III, § 1. Judicial power is the power to interpret the Constitution; "[i]t is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 1 Cranch. 137, 177

(1871). There is nothing more central in interpreting the Constitution than the power to define the constitutional mechanics for judicial analysis. This has always been a task for the courts, and not for Congress.

"To allow a simple majority of Congress to have a final say on matters of constitutional interpretation is therefore fundamentally out of keeping with the constitutional structure." Mitchell, 400 U.S. at 205. RFRA, in legislating a test in direct opposition to the Court's decision in Smith, imposes a methodology that has the effect of setting aside the judgment of the Supreme Court. The imposition of this test violates the Separation of Powers Doctrine.

RFRA's defenders have attempted to justify it as merely a statutory right, rather than the attempted constitutional revision that it is. Yet, the court of appeals in Flores v. City of Boerne, 73 F.3d 1352 (5th Cir. 1996) explicitly noted

> that Congress has created a statutory right is facile and ultimately incomplete. . . . We will not pretend that RFRA is anything but a direct response to the Supreme Court's decision in Smith.

Flores, 73 F.3d at 1361.

As this Court recently stated, "it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." Loving v. United States, No. 94-1966, 1996 WL 287732 at *6 (June 3, 1996) (citing Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447 (1995)). The Supreme Court is "the branch whose distinctive duty it is to declare 'what the law is,' Marbury v. Madison, 1 Cranch, at 177," particularly when the Court is exercising its constitutional authority to interpret the Bill of Rights.

Lopez, 115 S. Ct. at 1639-40 (Kennedy, J., concurring); Miller v. Johnson, 115 S. Ct. 2475, 2491 (1995). In the words of Alexander Hamilton:

> The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Federalist No. 78 in The Federalist Papers 229 (Roy P. Fairfield ed. 1981). See also Mitchell, 400 U.S. at 205 (Harlan, J., concurring in part and dissenting in part) ("[To] allow a simple majority of Congress to have final say on matters of constitutional interpretation is . . . fundamentally out of keeping with the constitutional structure."). RFRA, which is a straightforward repudiation of this Court's decision in Smith, 494 U.S. 872, violates this fundamental, "structural" constitutional principle. See Plaut, 115 S. Ct. at 1463; see also U.S. Const. art. I, § 1; art. III, § 1.

The colloquy between Representatives Dannemeyer and Solarz during their consideration of RFRA in the 101st Congress exposes the danger in allowing Congress the power to define the constitutional inquiry and impose it upon the courts:

MR. DANNEMEYER. I just have a little amendment here that I would like to have you think about supporting.

You know, setting aside a decision of the U.S. Supreme Court is not something any of us take lightly. This citizen in America happens to believe that there are products of our U.S. Supreme Court going back, just for a starting point, to 1962, that should be reversed. For instance, voluntary prayer in public schools is the decision in 1962 whereby we Americans kicked the Creator out of the public education process in America. I mention this because, should we be surprised that the current generation of people in America is having difficulty in conforming to a standard of not using drugs, which is recognizing a standard on how we treat our body, when we as a society have kicked the Creator of the standards out of the public schools of America. That decision, I think, was the cornerstone of the expansion of secular humanism which some contend, as I do today, is the religion of America, that there is no God.

So this modest little amendment just adds to this bill a provision that we reverse Engel v. Vitale in 1962. Would you support that?

[Laughter.]

MR. SOLARZ. If we can assemble the same coalition in support of your proposal, Mr. Dannemeyer, I would certainly be prepared to consider it.

[Laughter.]

MR. EDWARDS. How about throwing in Roe v. Wade?

[Laughter.]

MR. DANNEMEYER. It says we can't even post the Ten Commandments, the foundation of the Judeo-Christian ethic, on the walls of the public classrooms of America. How silly can we get in how we raise the next generation in this country?

MR. SOLARZ. If we're really going to go after all of the Supreme Court decisions using this bill as a vehicle, let me say, as a Representative from a State scheduled to lose at least three seats in the House of Representatives, you might want to consider Baker v. Carr in it as well.

[Laughter.]

(Hearings on H.R. 5377, Statement of Representative Solarz at 21.)

The light-hearted tone of this colloquy does not mask the threat to the judicial branch lurking in the shadows of RFRA. At stake is nothing less than the maintenance of the proper constitutional balance of power among the branches of our federal government.

CONCLUSION

For the reasons stated above, the Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit, or, in the

alternative, hold this case for determination pending resolution of City of Boerne, No. 95-2074, cert. granted, 1996 WL _____ (October, 1996).

Respectfully submitted,

*FRANK D. REMINGTON
JOHN S. GREENE
Assistant Attorneys General
*Counsel of Record

JAMES E. DOYLE
Attorney General
Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3542
Attorneys for Petitioner

October 30, 1996

APPENDIX

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In The

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 95-3924

SYLVESTER SASNETT, *et al.*, individually and on behalf of others similarly situated,

Plaintiffs-Appellees,

and

UNITED STATES OF AMERICA,

Intervening Plaintiff-Appellee,

v.

MICHAEL J. SULLIVAN, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 94 C 52--**Barbara B. Crabb**, *Judge*.

ARGUED May 14, 1996--DECIDED August 2, 1996

Before POSNER, *Chief Judge*, and ESCHBACH and EVANS, *Circuit Judges*.

POSNER, *Chief Judge*. Wisconsin severely restricts the wearing of jewelry by jail and prison inmates. A regulation forbids the possession of "items which because of shape or configuration are apt to cause a laceration if applied to the skin with force," and the state refuses to make an exception for religious jewelry, such as crucifixes, which (unless made of cloth) fall within the ban. Inmates brought this suit against the relevant officials to enjoin, as a violation of the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4, the defendants' refusal to make such an exception. The officials defend their refusal primarily on the ground that the Act is unconstitutional, exceeding the power that section 5 of the Fourteenth Amendment gives Congress to enforce the amendment, and secondarily on the ground that the ban of religious jewelry satisfies the Act's stringent test for permissible burdening of religion. The district judge rejected the constitutional challenge (as two other circuits in similar cases have done, *Flores v. City of Boerne*, 73 F.3d 1352, 1359-60 (5th Cir. 1996); *EEOC v. Catholic University*, 83 F.3d 455, 469-70 (D.C. Cir. 1996)), *Sasnett v. Department of Corrections*, 891 F. Supp. 1305, 1315-21 (W.D. Wis. 1995), and went on to grant summary judgment for the plaintiffs.

The background and content of the Religious Freedom Restoration Act are discussed in our recent opinion in *Mack v. O'Leary*, 80 F.3d 1175 (7th Cir. 1996), enabling us to be brief. The Act forbids government, federal or state, to "substantially burden" a person's exercise of his or her religion unless the government shows that the burden is the "least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1(b). The Act was motivated by a desire to supersede *Employment Division v. Smith*, 494 U.S. 872 (1990), which held that the free-exercise clause of the First Amendment allows the government to do just what the Act forbids, provided that the government does so by means of a law of general applicability not motivated by hostility toward

religion or toward a particular sect. In *Smith* the law was a general prohibition of controlled substances applied to the use of peyote in a religious ceremony of an Indian tribe. Before *Smith* the Supreme Court had used something much like, perhaps identical to, the test adopted in the Act in interpreting the free-exercise clause. The Act thus seeks to return the courts, when a law burdening religious observance is challenged, to the approach they had taken before *Smith*. The term "restoration" in the Act's title supports this interpretation of what Congress was about, as does the Act's text and legislative history.

The state argues that section 5 of the Fourteenth Amendment does not authorize Congress to create new rights, *Civil Rights Cases*, 109 U.S. 3, 11 (1883); *City of Rome v. United States*, 446 U.S. 156, 210-12, 220 (1980) (dissenting opinion), and that this is just what the Religious Freedom Restoration Act did. *Smith* had held that a person has no right to demand special treatment by government just because he will find it difficult to practice his religion otherwise. The Act creates such a right. This is one way to look at what Congress did, but it cannot be the only way. Whenever Congress passes a law under the authority of section 5, it creates a right. The question is whether it has exceeded its authority in creating the particular right at issue. It has not if the right is reasonably designed to secure a right created by the Fourteenth Amendment itself. The clearest examples come from the Voting Rights Act of 1965, 42 U.S.C. §§ 1973 *et seq.* The Supreme Court held in *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959), that literacy tests for voters do not violate the Fourteenth Amendment--whereupon Congress prohibited literacy tests for voters, 42 U.S.C. § 1973b(e), and the Court upheld the prohibition. *Katzenbach v. Morgan*, 384 U.S. 641 (1966). And on the same day that the Court held in *Mobile v. Bolden*, 446 U.S. 55 (1980), that at-large electoral systems which have the practical effect of preventing the election of any blacks do not violate the Fourteenth or Fifteenth Amendments, it

held in *City of Rome v. United States, supra*, that the provision of the Voting Rights Act that authorizes the Department of Justice to veto such systems if they have an exclusionary effect is valid under the Fifteenth Amendment's counterpart to section 5.

In both sequences Congress was held to be empowered by the enforcement clauses of the Reconstruction amendments to outlaw a practice that while not unconstitutional deprived a constitutional right of practical efficacy. The legislation bore a necessary and proper relation to the underlying right. *Katzenbach v. Morgan, supra*, 384 U.S. at 650. The plaintiffs argue that RFRA bears a similar relation to the constitutional right to exercise one's religion without interference by government. After *Smith* the only way to prove a violation of the free-exercise clause is by showing that government discriminated against religion, or a particular religion, by actually targeting a religious practice, rather than hit it by accident while aiming at something else. A tax on churches, a prohibition (shades of Elizabethan England) against conducting a mass, a ban on wearing yarmulkes--only *intentional* discrimination, as illustrated by these hypothetical cases, is actionable under *Smith*. Even under this demanding test a law neutral on its face but intended to discourage a particular religious practice or belief infringes the free-exercise clause, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993), but the intent behind such a law may be difficult to prove. Its apparent neutrality would be sand in the eyes of the finder of fact. Congress could, the plaintiffs argue, have established the stiffer test of RFRA to prevent government from resorting to such difficult-to-detect methods of discrimination, in just the same way that the Voting Rights Act forbade literacy tests for voters because it was so difficult to prove (what everyone suspected) that the hidden purpose of the tests was to disfranchise blacks. On this view, instead of having to prove that the Wisconsin prison system was motivated by hostility to religion in

refusing to permit the wearing of religious jewelry, all that the plaintiffs would have to prove was that the refusal imposed a substantial burden on their religious practice. By proving this they would shift to the state the burden of proving if it could that it had no other way of achieving a legitimate and important governmental objective.

Granted, the legislative history of the Act contains only hints of this theory of what the Act was intended to do. See, e.g., H.R. Rep. No. 88, 103d Cong., 1st Sess. 6 (1993); "The Religious Freedom Restoration Act," Hearing before the S. Comm. on the Judiciary, 102d Cong., 2d Sess., ser. no. J-102-82, at 95-96 (Sept. 18, 1992) (statement of Prof. Douglas Laycock). But a statute's constitutionality should not depend on the ability of congressional staff to write a plausible brief for it into the committee reports. *Katzenbach v. Morgan, supra*, 384 U.S. at 653. Legislative history is too easy to manufacture. And anyway it is not the motive of the legislators that is important (at least when a statute is not attached on the basis of an invidious purpose, as in *Edwards v. Aguillard*, 482 U.S. 578, 591-92 (1987), and *Wallace v. Jaffree*, 472 U.S. 38, 56-61 (1985)), but whether the statute they pass is within the scope of their constitutional authority. The motivation behind the Religious Freedom Restoration Act was in fact disagreement with the Supreme Court's interpretation of the Constitution. The Act could still be within the scope of section 5 if its effect is, without infringing any constitutional rights, to make the legal remedies against violations of the free-exercise clause more effective because requiring less proof.

We are given some pause, however, by the lack of a recent history of governmental discrimination against religious observance. That history is not a complete blank. See Douglas Laycock, "Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century," 80 *Minn. L. Rev.* 1047, 1096 (1996). But it is not easy to take entirely seriously the

proposition that the enactment of RFRA was necessary in order to prevent the states from engaging in forms of intentional discrimination that, unlike the ordinance invalidated in *Church of the Lukumi Babalu Aye*, could not readily be shown to be intentional. The factual basis for the law, when interpreted as a law designed simply to make it easier to prove a violation of an existing constitutional right declared by the Supreme Court, is feebler than the factual basis for the Voting Rights Act. And there is nothing here that corresponds to one of the grounds of *City of Rome v. United States, supra*, 446 U.S. at 176-77--that it was necessary to legislate against practices not unconstitutional in themselves in order to extirpate the effects of past discrimination. Both grounds emphasized by the Supreme Court in its decisions upholding provisions of the Voting Rights Act--the desirability of simplifying the proof of discrimination and the desirability of eliminating the present effects of past discrimination--are simply applications of the familiar principle of equitable remedies that an injunction or other equitable decree may fence the defendant in, forbidding lawful as well as unlawful conduct in order to prevent the evasion of the core prohibition in the decree and to extirpate any lingering effects of the violation sought to be remedied. *FTC v. National Lead Co.*, 352 U.S. 419, 429-30 (1957); *Szabo v. U.S. Marine Corp.*, 819 F.2d 714, 721 (7th Cir. 1987); *Larsen v. Sielaff*, 702 F.2d 116, 118 (7th Cir. 1983).

But we do not think that the scope of section 5 of the Fourteenth Amendment is limited to the strictly remedial aim evident in, for example, the ban on literacy tests. Rights are instruments for achieving concrete goals. The right to exercise one's religion free of government interference is an instrument for achieving the goal of religious freedom. That freedom is impaired by practices that do not, as well as by practices that do, infringe the constitutional right itself as it was authoritatively construed in the *Smith* case. Religions that have strong

support among influential people have enough influence in the political process to be able to make sure that legislation is not passed that will inadvertently burden the observances required or encouraged by the religion. It is not an accident that we have Sunday closing laws rather than Thursday closing laws. Religions that have fewer members, especially if those members are drawn from the margins of society, do not have sufficient influence over the legislative process to avoid being flailed by the dinosaur's tail of legislation of general applicability, legislation not motivated by any animus toward minor sects but merely insensitive to their interests--possibly even oblivious to their existence. The formal right of the members of these sects to the free exercise of their religion may have little practical value if observance is made onerous by general-purpose legislation. It seems to us that Congress can properly legislate under section 5 to make the formal right of religious freedom of persons who lack political power in individual states (yet are somehow able to form or benefit from the formation of an effective coalition to obtain legislative assistance at the national level) a meaningful freedom of religion are unlikely to be heard in state legislatures.

We are mindful that by progressively incorporating almost the entire Bill of Rights, expansively interpreted, into the due process clause of the Fourteenth Amendment, the Supreme Court has greatly enlarged the reach of section 5, *Hutto v. Finney*, 437 U.S. 678 (1978); *id.* at 717-18 (dissenting opinion); *United States v. Price*, 383 U.S. 787, 789 (1966), and we share the state's anxiety lest the clause swallow up the remaining powers of state government. Suppose that Congress, concerned that many policemen flout Fourth Amendment rights, which are among those incorporated in the Fourteenth Amendment, passed a law requiring every state and local government to provide two weeks each year of instruction to all its law enforcement officers in the principles of the Fourth amendment. Or forbade these governments to hire police

officers who had ever been found to have violated a suspect's Fourth Amendment rights. Or required high schools to offer instruction in the law of search and seizure. These hypothetical cases and others that could be put suggest the necessity of imposing limits on the scope of the enforcement clause beyond the obvious one that it may not be used to infringe other constitutional rights. We think that in addition it may not be employed beyond reasonable limits fixed with due regard for the autonomy and responsibility of state and local government. Exactly what those limits are is unclear, but we do not think that the Religious Freedom Restoration Act reaches or exceeds them. It does not impose substantial direct costs on the states, as in the examples we have given, because it makes an exception for regulations that are necessary to the furtherance of compelling state interests. It does not enlist state officials as federal functionaries. It does not make the states dance to a federal tune, beyond requiring them to accord a limited measure of protection to religious interests that may not be represented in the politics of the state.

We defer to the Fifth Circuit's analysis of why the Act also does not violate the separation of powers or the establishment clause of the First Amendment. *Flores v. City of Boerne, supra*, 73 F.3d at 1361-64. We add only that Congress has not "overruled" *Smith* or assumed a paramount authority of constitutional interpretation in derogation of the Supreme Court's authority under Article III. *Smith* remains undisturbed within its domain, that of the meaning of the First Amendment. The Religious Freedom Restoration Act does not alter that meaning. It creates a new statutory right designed to buttress the constitutional right.

That the Act, assuming its constitutionality, was soundly applied in this case is not in doubt, given the test we adopted in *Mack v. O'Leary, supra*, 80 F.3d at 1178-80. The test, so far as applicable to the challenged regulation,

is whether the adherents of a religion are being prevented, without justification based on a compelling interest, from engaging in religiously motivated conduct or expression, whether or not the burdened practice is mandatory for adherents. The crucifix is to many Christians the central symbol of their faith. Wearing it on a chain around one's neck, while certainly not required by the laws of the Roman Catholic Church or, so far as we know, any other Christian sects, is religiously motivated. Prohibiting the wearing of it thus places a substantial burden, within the meaning of the Religious Freedom Restoration Act, on the plaintiff's observance of their religion.

So the burden of justification is on the state; and it has not been carried. The regulation to which the defendants refuse to make an exception forbids the wearing of a crucifix even if it is too small or light to be a weapon (at least more of a weapon than a fist, a tooth, or a fingernail), too inexpensive to barter for a weapon, invisible because worn under clothing, and not a gang symbol or easily confused with one. The state allows prisoners to have rosaries, which could be used to strangle a fellow prisoner or a guard, and bans crucifixes even in correctional facilities wholly occupied by white-collar prisoners who do not belong to gangs or get into fights with each other or the guards. These features of the state's practice blast the case for regarding a ban on crucifixes and other religious jewelry as a serious and measured response to a concern with violence or a concern with gangs, legitimate and important as these concerns are. If particular types of religious (or religious jewelry of any type in the hands of prisoners reasonably believed prone to use it for purposes of weaponry, barter, or gang insignia) pose a genuine threat to prison security, the state can ban them; prison security is a compelling state interest. *Id.* at 1180.

We asked the parties to file supplemental briefs concerning the possible bearing on this case of the Prison

Litigation Reform Act of 1996, Pub. L. 104-134, Title VIII (to be codified at 18 U.S.C. § 3626). The Act restricts prisoner litigation in a variety of ways, and one of the restrictions--that any injunctive relief be as narrowly drawn as possible, § 802(a) (to be codified at 18 U.S.C. § 3626(a)(1))--is expressly applicable to pending litigation. § 802(b)(1). The parties agree, however, that we should not attempt ourselves in the first instance to determine whether the injunction that the district court issued is consistent with this new provision. It is always open to a defendant to ask the district court to modify an injunction in light of changed circumstances, including a change in the applicable law. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 388-90 (1992); *Balark v. City of Chicago*, 81 F.3d 658, 661-65 (7th Cir. 1996); *In re Hendrix*, 986 F.2d 195, 198 (7th Cir. 1993). If the defendants can show that the injunction does not conform to the new law, the district judge will modify the injunction.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

SYLVESTER SASNETT, LONNIE SMITH, JAMES LOWERY, JAMES HADLEY and BARBARA MILLER, et al., individually and on behalf of others similarly situated,

Plaintiffs, ORDER

v. 94-C-52-C

MICHAEL J. SULLIVAN, Secretary, Department of Corrections; KEN SONDALLE, Administrator, Division of Adult Institutions; JEFFREY ENDICOTT, Warden, Columbia Correctional Institution; GARY McCAUGHTRY, Warden, Waupun Correctional Institution; GERALD BERGE, Warden, Fox Lake Correctional Institution; KRISTINE KRENKE, Warden, Taycheedah Correctional Institution; their agents, assistants, officials, employees, successors and others acting in concert or cooperations with them,

Defendants.

The order entered herein on December 1, 1995, is amended in the following respects.

1. The word "motivated" is substituted for "compelled" in the first full paragraph, line two, page thirty-two.

In all other respects, the order stands as entered.

Entered this 9th day of January, 1996.

BY THE COURT:

/s/ Barbara B. Crabb
District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

SYLVESTER SASNETT, LONNIE SMITH, JAMES LOWERY, JAMES HADLEY and BARBARA MILLER, et al., individually and on behalf of others similarly situated,

Plaintiffs, ORDER

v. 94-C-52-C

MICHAEL J. SULLIVAN, Secretary, Department of Corrections; KEN SONDALLE, Administrator, Division of Adult Institutions; JEFFREY ENDICOTT, Warden, Columbia Correctional Institution; GARY McCAUGHTRY, Warden, Waupun Correctional Institution; GERALD BERGE, Warden, Fox Lake Correctional Institution; KRISTINE KRENKE, Warden, Taycheedah Correctional Institution; their agents, assistants, officials, employees, successors and others acting in concert or cooperations with them,

Defendants.

The order entered herein on December 1, 1995, is amended in the following respects.

1. The word "defendants" is substituted for "plaintiffs" in the first full paragraph, line eight, page forty-five.

2. The word "plaintiffs" is substituted for "defendants" in the first full paragraph, line six, page forty-eight.

In all other respects, the order stands as entered.

Entered this 6th day of December, 1995.

BY THE COURT:

/s/ Barbara B. Crabb
District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

SYLVESTER SASNETT, LONNIE SMITH, JAMES LOWERY, JAMES HADLEY and BARBARA MILLER, et al., individually and on behalf of others similarly situated,

Plaintiffs,

OPINION AND ORDER

v.

94-C-52-C

MICHAEL J. SULLIVAN, Secretary, Department of Corrections; KEN SONDALLE, Administrator, Division of Adult Institutions; JEFFREY ENDICOTT, Warden, Columbia Correctional Institution; GARY McCAUGHTRY, Warden, Waupun Correctional Institution; GERALD BERGE, Warden, Fox Lake Correctional Institution; KRISTINE KRENKE, Warden, Taycheedah Correctional Institution; their agents, assistants, officials, employees, successors and others acting in concert or cooperations with them,

Defendants.

This is a civil action for injunctive and declaratory relief brought pursuant to 42 U.S.C. § 1983 and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb. Plaintiffs are Wisconsin state prisoners who challenge two internal management procedures regulating the wearing of jewelry and limiting to twenty-five the number of publications inmates are allowed to possess. The internal management procedures prohibit plaintiffs Sylvester Sasnett, Lonnie Smith and Barbara Miller from wearing

crosses around their necks and caused plaintiffs Sasnett, James Lowery and James Hadley to relinquish possession of individually owned religious publications. Plaintiffs contend that the enforcement of these procedures violates their rights 1) to free exercise of religion under the First Amendment, by substantially burdening their exercise of religion using a means not rationally related to a legitimate governmental purpose; 2) to free exercise of religion under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, by imposing a substantial burden on their practice of religion, in the absence of a compelling governmental interest and without using the least restrictive means of furthering a governmental interest; and 3) to due process under the Fourteenth Amendment by restricting their liberty interest in religious materials and items without affording plaintiffs the process due such deprivation. In addition, plaintiffs contend that defendants' regulations and policies restricting religious exercise are overbroad and facially invalid.

The case is before the court on the parties' cross motions for summary judgment. In an opinion entered June 23, 1995, Sasnett v. Department of Corrections, 891 F. Supp. 1305 (W.D. Wis. 1995), I considered defendants' contention that the Religious Freedom Restoration Act is unconstitutional and ruled that Congress did not overstep its constitutional bounds in passing the act. The parties now debate the proper interpretation and application of the act. Plaintiffs contend that the challenged regulations substantially burden their exercise of religion by preventing them from wearing crosses and possessing religious works beyond the twenty-five publication limit. Defendants argue that plaintiffs cannot meet the act's initial requirement of showing a substantial burden on their exercise of religion because plaintiffs cannot prove that their respective religions mandate the proscribed practices at issue. Plaintiffs contend that the act does not necessitate proof that their religious practices are mandated but requires only that the substantial burden

fall on a practice that is sincere and religiously motivated. I conclude that the Religious Freedom Restoration Act calls for a religiously motivated standard but find that plaintiffs have met their burden on this point only with respect to the jewelry prohibition.

Defendants argue that they implemented the jewelry restriction to further the compelling state interests of prison safety, order and discipline and that the complete prohibition is the least restrictive means of achieving those goals. Plaintiffs contend that defendants' proffered aims are not compelling, that even if they are compelling, the regulation is not rationally related to furthering those goals and that the regulation is not the least restrictive means of achieving defendants' stated goals. I conclude that although defendants' stated goals are compelling, they have not chosen the least restrictive means of achieving them with respect to the jewelry regulation. I further conclude that plaintiffs' other claims do not afford them grounds for any additional relief. Accordingly, I will grant summary judgment for plaintiffs on the jewelry restriction and summary judgment for defendants on the publication limitation.

From the parties' proposed findings of fact, I find the following facts to be undisputed.

UNDISPUTED FACTS

Plaintiff Sylvester Sasnett is a prisoner at Columbia Correctional Institution in Portage, Wisconsin; plaintiff Lonnie Smith is incarcerated at Fox Lake Correctional Institution in Fox Lake, Wisconsin; plaintiffs James Lowery and James Hadley are imprisoned at Waupun Correctional Institution in Waupun, Wisconsin. Plaintiff Barbara Miller has been an inmate at Taycheedah Correctional Institution in Fond du Lac, Wisconsin, from July 19, 1985 until present, except for the period between January 13, 1994 and January 19, 1995, when she was

incarcerated at the Outagamie County jail in Appleton, Wisconsin. Plaintiffs are subject to the laws, rules, regulations and informal policies and procedures of the state of Wisconsin and its Department of Corrections. If plaintiffs violate these proscriptions, they are subject to discipline.

Defendant Michael Sullivan is Secretary of the Department of Corrections. Defendant Ken Sondalle is Administrator of the Division of Adult Institutions of the Department of Corrections. Defendants Jeffrey Endicott, Gary McCaughtry, Gerald Berge, and Kristine Krenke are the wardens of Columbia Correctional Institution, Waupun Correctional Institution, Fox Lake Correctional Institution, and Taycheedah Correctional Institution, respectively. All defendants are responsible for enforcing the rules, regulations, practices and procedures of the Department of Corrections and are sued in their official capacities.

The Department of Corrections and the individual correctional institutions regulate and restrict the possession and acquisition of inmates' personal property in several ways, including administrative rules promulgated pursuant to chapter 227 of the Wisconsin Statutes and published in the Wisconsin Administrative Code; emergency rules; internal management procedures. which are not promulgated according to statute and are not legislative rules of conduct; and institution handbooks provided to prisoners containing various rules, internal management procedures, policies and procedures.

In March 1988, a fire marshal from the Portage Fire Department conducted a fire inspection of Columbia Correctional Institution and recommended for fire protection that legal papers and storage in cells should be limited to a single 21" x 21" x 21" box. Columbia Correctional Institution adopted this recommendation in September 1988. Fire prevention aims to minimize the development and spread of a fire and is of particular

importance to the safety of individuals, such as inmates, who cannot get away from a fire on their own. Fires spread faster when large amounts of paper are strewn about an area rather than stored in a container.

In January 1990, Sheldon Schall, Chief of Fire Protection for the Department of Industry, Labor and Human Relations, conducted a comprehensive fire inspection of Waupun Correctional Institution, looking at the accumulation of combustible material in cells. During the inspection, Schall observed a significant number of cells presenting a great fire potential because of the amount of paper stored in the cell or the manner in which the paper was stored. Many cells contained bags or boxes of documents and magazines. Schall was concerned that the bags and boxes of paper throughout the cell would pose an obstacle to the prison staff's mobility when entering a cell for emergency purposes. In addition, he was concerned that the accumulation of paper in the cells would have a negative effect on the air exchange system, causing a build-up of smoke and toxic gases in the event of a fire. Schall recommended that to diminish the potential for a fire, allow for ease of mobility in a cell during an emergency and provide for proper air exchange, paper should be limited to an amount that could be stored in a 21" x 21" x 21" container. Schall recommended a container of that size because it could fit under a bunk while still providing reasonable room to store paper.

On or about May 13, 1991, defendant Gerald Berge, then administrator of the Division of Adult Institutions, Department of Corrections, sent a memo to all wardens concerning inmates' possession of personal property and asked the wardens to respond to the issue of allowable property, including whether it was necessary to examine additional limits on that property. All wardens agreed that inmate property should be reviewed and limited in light of an increased inmate population, double celling and frequent inmate transfers.

On or about July 29, 1991, defendant Sondalle appointed an inmate property work group to review the wardens' responses and the department's inmate property procedures and to make specific recommendations to Sondalle's office regarding the limiting and handling of inmate personal property by October 1, 1991. The work group discussed the overcrowding in the Wisconsin prison system that had led to double celling and its associated problems of excessive property in a cell designed for one individual. In addition, the work group analyzed the wardens' responses and ultimately reported to defendant Sondalle that personal property should be limited and some property eliminated: 1) to reduce the fire hazards associated with property in cells; 2) to protect the department from liability for losses resulting from the high volume of inmates being moved through the system; 3) to reduce the frequency of, and temptation for, inmate theft; 4) to reduce the use of property as a bartering commodity and as payoffs in gambling; 5) to reduce the amount of staff resources needed to process incoming and outgoing property, inventorying property, packing, shipping and tracking inmate property, 6) to reduce the sheer volume of property because of limited floor space in cells, especially considering the overcrowded conditions; 7) to reduce property because a high volume of property makes hiding contraband easier and significantly slows the process of searching cells and; 8) to reduce property because a high volume of property leads to fights and strong arming. The inmate property work group recommended that the maximum amount of inmate property fit inside three containers for transporting purposes, specifying dimensions of 32" x 15" x 14" for personal property, 20" x 20" x 20" for hobby materials and 20" x 20" x 20" for legal materials.

The inmate property work group also discussed the issue of inmates wearing jewelry and noted that jewelry, i.e. rings, earrings, pins, crosses, crucifixes and medallions are worn by gang members to show particular gang affiliations. The committee believed that there was no way

to distinguish readily between jewelry worn as a symbol of religious belief and jewelry worn to signify gang affiliation. To avoid discriminating against any particular religion that used as a symbol of its faith a symbol similar or identical to a symbol used as a gang identification, the work group recommended disallowance of all jewelry. Although three-inch crucifixes had been allowed under the then-existing policies, the work group advised eliminating them as allowed property because their wearing was not known to be required by any religious faith.

The work group recommended eliminating as allowable property all jewelry except one watch, a personal wedding band and a medical alert medallion because jewelry was a potentially expensive item that could be used in bartering and strong arming and could be claimed as lost or stolen when such was not the case and the majority of allowed jewelry served no constructive purpose. Also, the committee advocated the discontinuance of color combinations in inmate clothing because gang members wear certain colors of clothing to show their gang affiliation.

The work group considered the difficulty of defining different categories of publications so that they could be readily distinguished from one another. The group recommended limiting inmates to the possession of twenty-five publications of any type including legal, religious and educational materials, but not including publications checked out from the institution libraries. In addition, the work group considered the possession of legal materials, including personal writings and miscellaneous documents maintained in inmate cells in light of the fire marshals' recommendations and other problems associated with paper. The group recommended that each inmate be allowed to retain legal materials necessary for active legal actions, with the legal materials fitting into one box upon transfer, and that additional storage space for legal material be available on a temporary basis to inmates who

demonstrated a need for additional material in connection with on-going litigation. The inmate property work group took into consideration the types and amounts of property it believed would provide inmates with the basic necessities while at the same time addressing the problems of excessive inmate property. The recommendations of the work group were given to the institution wardens for review and comment and then forwarded to Terri Landwehr, Administrator of the Division of Adult Institutions of the Department of Corrections, for approval. Landwehr and defendants Sondalle, McCaughtry, Endicott and Berge agreed with the findings of the work group.

The Department of Corrections affords inmates an opportunity to raise grievances that are investigated and decided through the inmate complaint review system. The number of inmate complaints has increased steadily with the increasing inmate population. For the years 1982 through 1994, property ranked first in volume of complaints received, averaging 25.43% of the complaints per year. When inmate personal property is lost or damaged by staff action or inaction, the Department of Corrections compensates the inmate.

The Dodge Correctional Institution's central transportation unit transports most of the inmates of the male adult correctional institutions among the various institutions. Occasionally, institutions transport their own inmates. Before the implementation of the internal management procedures concerning personal property and clothing, separate trips were often required to pick up and transfer the property of inmates that did not fit in the transport van or bus. Since the implementation of the procedures, it is unusual to make more than one trip to transport the inmates and their property.

An excessive amount of publications in an inmate's cell not only presents a fire hazard but also substantially increases the hiding places for contraband and the time it

takes an officer to search the cell. With double celling, there is twice the amount of property to be searched. The most time-consuming aspect of a cell search is the searching of paper such as letters, legal materials, books, magazines and newspapers but it is necessary for the security of staff, inmates, and the public. Officers have found razor blades and drugs in such papers as well as motor vehicle registration stickers stolen by an inmate from his institution's production factory and intended to be sent to his family for illegal sale "on the street." The implementation of the new property rules has cut in half the time required to search a cell and has enhanced the safety of the institutions by making it easier to locate and seize any contraband.

The Columbia Correctional Institution, a maximum security institution opened in May 1986, began double celling on January 30, 1991. Waupun Correctional Institution began double celling on March 5, 1987.

On May 1, 1992, the Department of Corrections, Division of Adult Institutions, issued a memorandum to all wardens and superintendents entitled "Revised Internal Management Procedures Relating to Inmate Personal Property and Clothing," containing revised inmate personal property and clothing procedures that became effective on June 1, 1992, although inmates incarcerated on that date were given until June 1, 1993, to come into compliance. Under Internal Management Procedure DOC 309 IMP # 1-D, inmates are forbidden to wear earrings, necklaces, bracelets, ankle bracelets and pins, including religious jewelry such as crucifixes. Internal Management Procedure DOC 309 IMP #4 prohibits inmates from possessing more than twenty-five books, magazines, newspapers or periodicals, including religious publications, and requires that inmates purchase all reading materials through approved retail outlets or publishers. Inmates cannot receive publications that do not come from a

publisher or other commercial source. Wis. Admin. Code § DOC 309.06(2)(a).

On June 1, 1994, new permanent property rules went into effect. One of the rules, Wis. Admin. Code § DOC 309.35(3), directs prison wardens to develop policies and procedures relating to the acquisition, possession and use of personal property by inmates, to make a list of personal property items permitted at their institutions and to determine the permissible methods by which personal property may be acquired. Subsection (3)(d) forbids inmates to possess more personal property than can fit into a receptacle 32" x 16" x 16", or 8192 cubic inches, excluding medically prescribed items, hobby materials, legal materials, electronic equipment, typewriters, fans or other "large items." Subsection (3)(e) requires that an inmate's hobby materials fit into a receptacle 14" x 14" x 14", or 2744 cubic inches, excluding one over-sized item. Subsection (3)(f) requires that an inmate's legal materials fit into a receptacle no larger than 20" x 20" x 20", or 8000 cubic inches, and allows wardens to authorize additional storage space on a temporary basis "upon a demonstrated need in connection with on-going litigation and consistent with fire codes and regulations." Wis. Admin. Code § DOC 303.47 provides for the discipline of inmates who possess contraband and defines contraband as any items not included on "the posted list" of permissible inmate possessions, items not listed on the inmate's property list and items not belonging to the inmate.

Inmates in the general population and some segregation units of the Wisconsin prison system are allowed to have matches, tobacco and cigarettes in their cells.

Because of the new property restrictions, plaintiff Sasnett was required to relinquish approximately eleven religious books, including The Amplified Bible, volumes 1 through 3 of the Jamison, Fauset Brown Commentary, the

Inductive Study Bible, the NIV Interliner Greek-English New Testament and the NIV Interliner Hebrew-English Old Testament. These books aided Sasnett in his desire to study religion and become a minister. Sasnett sent the books out of prison to or with his pastor. The Columbia Correctional Institution offered Sasnett the opportunity to donate his books to the chapel library but he chose not to do so. Sasnett also gave up a gold crucifix.

Sasnett is presently employed in the chapel at the Columbia Correctional Institution. The chapel contains two crosses. Religious property used in group services, such as a crucifix, is available for religious services in the chapel and other appropriate areas of the Columbia Correctional Institution.

Sasnett belongs to the Truth Bible Church, a nondenominational Christian church. The Truth Bible Church believes in the word of God as being the sole counsel and the sole means and direction by which people should live. Sasnett knows of only one Truth Bible Church in the country, located in Waukesha, Wisconsin. The Truth Bible Church has no specific texts or teachings unique to that church alone, other than the Holy Bible.

Before 1992, prison regulations permitted plaintiff Sasnett to wear a crucifix around his neck, but he did not. Sasnett received a crucifix in 1992 and after that time wore it at all times as a constant reminder of his faith. Sasnett's crucifix is about two inches long and consists of a simple yellow gold cross with a white gold body of Christ affixed to the cross. Sasnett wore the crucifix inside his shirt attached to a gold chain, measuring approximately eighteen inches. No one has ever attempted to steal Sasnett's crucifix or a watch that he wears that is worth approximately $32.00.

In addition to wearing a crucifix around his neck, plaintiff Sasnett practices his religion by attending services

regularly, praying in his cell, frequently reading his Bible and other religious books and consulting with his minister. Wearing a crucifix is not a requirement of plaintiff's religion. If Sasnett were forced to stop attending services, praying, studying the Bible and other religious books, and kept from consulting with his pastor, he would still consider himself a Christian and strive to live a Christian life. Sasnett does not have an image of Christ hanging on the cross in his cell.

Plaintiff Sasnett is aware that jewelry is often stolen in prison and has heard of gang members wearing distinctive pieces of clothing or other objects to indicate their gang affiliation. He has never been a gang member or worn a cross to signify gang membership.

Plaintiff Lonnie Smith is a Christian inmate at Fox Lake Correctional Institution who does not identify with a specific religious organization. He wore two crosses around his neck at all times from the time he received them as gifts to the time he was forced to surrender them pursuant to Department of Corrections property rules. One of Smith's crosses is approximately one and a half inches long; the other is slightly smaller, and both are made of yellow gold. The larger cross, worth approximately $75, is textured with tiny punched holes and the smaller cross, worth approximately $65, has carved lines on its surface. Except for the subtle texturizing visible only from close range, neither of Smith's crosses has any "stylizing" or extra parts. Each of the crosses came affixed to gold chains, one of approximately eighteen to twenty inches in length and the other about fourteen to sixteen inches long. The chains are probably worth several hundred dollars but plaintiff Smith would wear his crucifix attached to a string if allowed. Smith had his crosses blessed and wore them on the outside of his clothing to demonstrate his faith. Smith's crosses helped him to get to know God better and to deal with people better.

No one has ever attempted to steal Smith's crucifixes or his watch, which is worth approximately $75.00. Smith has never been a member of a gang, does not associate with gang members and does not know of anyone who uses crosses as gang insignia. Smith participates in church activities at Fox Lake Correctional Institution, including bible study, singing, songwriting and playing in a band. He also practices his religion by attending services regularly, praying in his cell, reading his Bible frequently, and urging others to lead a Christian life. If Smith were forced to stop practicing his religion in these ways, he would still consider himself a Christian and strive to live a Christian life.

Fox Lake Correctional Institution has a cross displayed in an encasement in the front of the chapel. The doors to the encasement are closed for non-Christian services. A crucifix is made available for Catholic services. Plaintiff Smith believes the cross represents everybody that comes to the chapel and that the cross that he wore around his neck represented him when he was not at church. Smith believes that he cannot be a Christian without wearing the cross because it helps him understand God and deal with people better. People knew Smith was a Christian before he received his crosses because he represented himself as a Christian. Plaintiff Smith spends as much time in the chapel as he can and seeks guidance from the Fox Lake chaplain.

Plaintiff Barbara Miller is a Lutheran incarcerated at Taycheedah Correctional Institution. She wore a cross around her neck at all times, except when bathing, from the time she received it until she was forced to surrender it pursuant to the Department of Corrections property rules. Miller's cross is about two inches long, consists of a plain yellow gold cross with a diamond chip in the middle, has no "stylizing" or extra parts, was attached to a gold chain approximately sixteen to eighteen inches long, and cost $32.00 when purchased. Miller feels closer to God

when she wears her cross. Reading the Bible has helped Miller some in compensating for the loss of the cross. Miller used her cross as an aid to prayer by holding it in her hand while she prayed.

Miller filed an inmate complaint pursuant to the inmate complaint review system to challenge the prohibition against wearing crosses. Her complaint was dismissed at both the institutional and appellate levels. Miller was informed that the prohibition was designed to prevent the wearing of gang-related jewelry.

Miller wears a watch worth approximately $75.00. No one has ever tried to steal either her cross or her watch. Miller has never been a member of a gang. In addition to wearing a cross around her neck, Miller practices her religion by praying in her cell, reading her Bible frequently, and consulting with her minister. If forced to stop these practices, Miller would still consider herself a Christian.

Plaintiff Miller does not attend Lutheran services at Taycheedah Correctional Institution because she thinks there is too much commotion with people "screaming and singing outrageously." Instead, Miller listens to religious tapes and reads the Bible in her cell. Plaintiff has a picture of Jesus Christ in her cell and believes that the images of Christ and the cross both signify belief in Christ. Miller believes a cross is not essential to being a Lutheran and does not act or relate to others any differently now that she is not permitted to wear the cross. She continues to be a Christian without her cross.

Plaintiff James Lowery claims to suffer from a multiple personality disorder. At least one of Lowery's alleged personalities, "Lee," is a strict Catholic. In order to comply with the rules limiting the allowable number of publications to twenty-five, plaintiff Lowery relinquished bible study material and booklets and several religious

books although he did not make a list of these books and does not remember their titles. Lowery felt compelled to part with these items because he wanted to retain as many "how-to" books on writing and filing legal documents as possible. Lowery's allotment of twenty-five publications consists entirely of legal materials except for one King James Bible. Lowery is segregated from the general population at Waupun Correctional Institution and does not have direct physical access to the chapel library but can request and receive religious publications from that library.

Plaintiff James Hadley does not belong to any organized religion but believes in God and is interested in learning more about religion, especially the Jehovah's Witness religion. Hadley never attended Jehovah's Witness services prior to his incarceration. Hadley's sister, who is a Jehovah's Witness, sent him the Jehovah's Witness pamphlets Watch Tower and Awake and he studied and discussed those with her. Prison guards confiscated these pamphlets during a "shakedown" of Hadley's cell. After Hadley was informed that he had to send his pamphlets out of the prison because of the twenty-five publication limit, he sent them home with his sister. Hadley kept a Mormon Bible and the Bibles of several other denominations, as well as a visitor guide, western era books, and Ebony and Outdoor Life magazines. Hadley believes that it was helpful to him to study and discuss the Jehovah's Witness literature with his sister, a member of that faith. In addition to studying the Jehovah's Witness materials and discussing them with his sister, Hadley seeks religious guidance by praying, reading his Bible and sometimes going to the prison chapel. If Hadley were prevented from praying and reading his Bible, he would still try to lead a righteous life and to seek understanding of God.

Services for Jehovah's Witnesses are held each Wednesday at Waupun Correctional Institution, at which

time the pamphlets Watch Tower and Awake are brought in by the Jehovah's Witnesses representative upon request. These pamphlets may be obtained for an inmate's personal possession. Hadley is unaware that Jehovah's Witness pamphlets are available in the chapel and has not asked anyone whether he can obtain access to them in the prison. A crucifix is displayed in the chapel for Catholic services at Waupun Correctional Institution, where both plaintiffs Lowery and Hadley are incarcerated.

Religious ornamentation has been the focus of interest across traditions and cultures throughout history. Ornamentation such as jewelry may be used as a symbol of status within a religious community, to ward off evil, to invite beneficial assistance, to protect health, to worship, to define the wearer's place in a religious world view, to obey religious laws, to mark stages in religious advancement and to indicate membership in a religious group or express religious identity in many other ways. Crosses and crucifixes are examples of religious jewelry. The use and importance of religious jewelry vary among religious traditions and among different practitioners within the same religious tradition. Christianity, and the plaintiff's versions of Christianity, do not mandate the wearing of a cross or crucifix.

Religious texts are used for prayer, liturgy, ritual, spiritual direction, healing, communication with the divine, reflection on the meaning of human existence and part of adherence to a religious community. Personal ownership and study of religious commentaries other than the Bible is not required by the plaintiffs' religions.

Religious practice confers many benefits to prisoners. Religious practice and faith can introduce an element of morality into inmates' thinking that leads them to behave lawfully. Religious practice and faith can give prisoners a great degree of personal satisfaction. Inmates who are involved in church activities and who are behaving

in ways consistent with religion usually act in ways that are consistent with penological goals.

Inmates at Columbia Correctional Institution may borrow up to three religious books through the chapel library for a period of two weeks and from the regular prison library for a period of three weeks and may renew the books if necessary. There are approximately 700 books in the chapel library. Inmates at Waupun Correctional Institution may borrow eight books, including religious publications, from the prison library for a period of four weeks with the option to renew the books for another four weeks. Inmates at Fox Lake Correctional Institution may borrow six religious publications and four religious cassettes through the chapel library for three weeks with the option to renew if no one else is waiting to borrow the item. Inmates at Taycheedah Correctional Institution may borrow up to five religious books and pamphlets through the chapel library for approximately one month and may check out four books from the library for a period of two weeks with a renewal option. Publications not available at these institutions may be obtained through inter-library loan. Religious publications borrowed from these libraries are excluded from the number of publications allowed in a cell.

The size of cells varies from prison to prison and even within the same prison.

OPINION

A. Religious Freedom Restoration Act

In an earlier opinion in this case, I explained the circumstances leading to Congress's passage of the Religious Freedom Restoration Act. See Sasnett, 891 F. Supp. at 1314. To reiterate briefly, in Employment Division, Department of Human Resources v. Smith, 494 U.S. 872, 878 (1990), the United States Supreme Court

held that generally applicable, religion-neutral laws that incidentally burden the free exercise of religion need not be justified by a compelling state interest. Congress viewed the Court's decision as virtually eliminating "the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion, and responded with the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, attempting to restore the prior law, which it viewed as more protective of religions. Sasnett, 891 F. Supp. at 1314 (citing 42 U.S.C. § 2000bb(a)(4)). In subsection (l)(b) of § 2000bb, Congress provided that:

(b) EXCEPTION. - Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person-

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

Plaintiffs' Religious Freedom Restoration Act claim can be analyzed in two parts: first, by determining whether plaintiffs' exercise of religion is substantially burdened by defendants' property regulations and then by determining whether defendants employ the least restrictive means possible to achieve the compelling state interests the regulations seek to promote.

Before beginning the analysis, it is necessary to note that the act applies to prisoners' free exercise claims. See Werner v. McCotter, 49 F.3d 1476, 1479 (10th Cir. 1995), cert. denied, 115 S. Ct. 2625 (1995); Bryant v. Gomez, 46 F.3d 948 (9th Cir. 1995)(per curiam); see also S. Rep. 111, 103d Cong., 1st Sess. (1993), reprinted in 1993 U.S.C.C.A.N. 1892, 1898-1901 (act establishes one standard for testing claims of government infringement on religious practices). The Senate explicitly rejected an amendment to

prohibit the act's application to prisoners. 139 Cong. Rec. S14,453 (daily ed. Oct. 27, 1993)(58-41 vote).

1. Substantial burden on exercise of religion

The initial and difficult question is deciding what constitutes a "substantial burden" on a person's exercise of religion. Defendants contend that the challenged regulations do not impose a substantial burden on plaintiffs' exercise of religion because neither wearing a cross nor maintaining possession of more than twenty-five religious books is mandated by any of the plaintiffs' respective religions. Defendants argue that the jewelry prohibition is not a substantial burden because plaintiffs can continue to adhere to their respective faiths without wearing a crucifix and the book limit does not force any plaintiff to give up his Bible, the only book required by any of the plaintiffs' religions.

Plaintiffs argue that the Religious Freedom Restoration Act does not compel them to show that the actions forbidden by the challenged regulations are "required" by their religions but necessitates only a showing that the prohibited practices are "motivated" by a sincere religious belief. Plaintiffs maintain that the Religious Freedom Restoration Act protects a person's own individualized beliefs and that a practice does not have to be in accordance with standardized or objective religious principles to receive protection.

To date, only two United States courts of appeals have issued opinions on interpreting the Religious Freedom Restorations Act's substantial burden test. Werner v. McCotter, 49 F.3d 1476; Bryant v. Gomez, 46 F.3d 948. In Bryant, the Court of Appeals for the Ninth Circuit held that

> the religious adherent . . . has the obligation to prove that a governmental [action] burdens the

> adherent's practice of his or her religion . . . by preventing him or her from engaging in conduct or having a religious experience which the faith mandates. This interference must be more than an inconvenience; the burden must be substantial and an interference with a tenet or belief that is central to religious doctrine.

46 F.3d at 949 (internal citations omitted)(emphasis added). In Bryant, the plaintiff sought relief requiring defendants to provide full Pentecostal services at the prison where he was incarcerated, arguing that defendants' refusal to hold full Pentecostal services precluded him from participating in the practices and using the "traditional instruments" specific to his faith. The court rejected plaintiffs claim because he presented no evidence that the practices employed during the service were mandated by the Pentecostal faith. Id.

In Werner v. McCotter, the Court of Appeals for the Tenth Circuit held:

> To exceed the "substantial burden" threshold, government regulation must significantly inhibit or constrain conduct or expression that manifests some central tenet to a prisoner's individual beliefs; must meaningfully curtail a prisoner's ability to express adherence to his or her faith; or must deny a prisoner reasonable opportunities to engage in those activities that are fundamental to a prisoner's religion.

49 F.3d at 1480 (citations omitted). In Werner, the plaintiff, a state prison inmate and practitioner of Native American shamanism, alleged that defendants had interfered unconstitutionally with the free exercise of his religion by denying him access to a sweat lodge, a medicine bag, various other religious symbols and a spiritual advisor or religious literature appropriate to his beliefs. Id. at

1478-79. In remanding plaintiff's claim for further evidentiary findings, the court noted that a prohibition against the possession of religious symbols for those faiths for whom the symbols have sufficient importance could qualify as a substantial burden under the Religious Freedom Restoration Act. Id. at 1481. Although in Werner the court incorporated Bryant's religious centrality element as part of its substantial burden test, it listed other factors for consideration that considerably broadened the scope of its substantial burden inquiry. Unlike the Court of Appeals for the Ninth Circuit in Bryant, the Tenth Circuit recognized the possibility that an individual's free exercise of religion could be substantially burdened even if the burdened practice were not one mandated by that individual's religion. Although the court did not choose specifically between a religiously mandated and religiously motivated test, it did emphasize the role of individual adherence to a particular faith.

In Werner, the court did not have to decide whether the Religious Freedom Restoration Act requires courts to apply a Bryant-like religiously mandated test or a religiously motivated inquiry. Unlike the Werner court, I must choose between these two significantly different tests. Because the parties agree that none of the plaintiffs' faiths mandate the wearing of crosses or the possession of religious publications above the limit of twenty-five, application of a religiously mandated test means that plaintiffs' case would fail.

A number of district courts have applied a religiously mandated test like the one articulated in Bryant. Muhammad v. City of New York Department of Corrections, 1995 WL 616578 at *29 (S.D. N.Y. Oct. 17, 1995); Daytona Rescue Mission v. City of Daytona Beach, 885 F. Supp. 1554, 1559-60 (adopting Bryant test); Weir v. Nix, 890 F. Supp. 769, 788 (S.D. Iowa 1995) (no substantial burden because prohibited practice not mandated by plaintiff's faith); Davidson v. Davis, 1995 WL 60732 at *5

(S.D. N.Y. Feb. 14, 1995). Numerous other courts have hedged, either finding or not finding a substantial burden without choosing between the tests. See Hall v. Griego, 896 F. Supp. 1043, 1047 (D. Colo. 1995) (applying Werner without distinguishing between mandated and motivated part of test); Rust v. Clarke, 883 F. Supp 1293, 1306-07 (D. Neb. 1995) (finding substantial burden on plaintiffs' exercise of Astrau religion); Alameen v. Coughlin, 892 F. Supp. 440, 448 (E.D. N.Y. 1995)(interference substantially burdened a belief "central" to plaintiffs religion); Hamilton v. Schriro, 863 F. Supp. 1019, 1022 (W.D. Mo. 1994)(finding substantial burden because forbidden practices were "essential component" of Native American religion) Only one court of which I am aware has determined specifically that the religiously motivated test is the proper interpretation of Congressional intent on the issue. See Muslim v. Frame, 897 F. Supp. 215 (E.D. Pa. 1995); see also Campos v. Coughlin, 854 F. Supp. 194, 209-10 n.13 (S.D. N.Y. 1994) (adopting a similar test focusing on sincerity of individual religious beliefs but in less explicit terms).

The language of the Religious Freedom Restoration Act does not indicate clearly whether Congress intended to apply a religiously mandated or a religiously motivated test but the legislative history makes evident that Congress was aware of the distinction. The difference played a role in debates concerning the application of the act to a woman's decision to seek an abortion, an issue especially pertinent at the time because Planned Parenthood v. Casey, 505 U.S. 833 (1992), was pending before the Supreme Court and it was uncertain whether the Court would overturn Roe v. Wade, 410 U.S. 113 (1973). Douglas Laycock & Oliver S. Thomas, Interpreting the Religious Freedom Restoration Act, 73 Tex. L. Rev. 209, 231 (1994). Pro-life supporters feared the bill would allow women to assert that their abortion decisions were motivated by religious beliefs. The following colloquy between Representative Stephen Solarz, the original sponsor of the

act, and Representative Henry Hyde, leader of the anti-abortion opponents to the bill, illustrates the debate.

> Rep. Hyde: Well, does your bill, H.R. 2097, protect conduct compelled by religious belief, or conduct motivated by religious belief?
>
> Rep. Solarz: I think that fine distinction is something that I would prefer to leave to the courts.
>
> Rep. Hyde: We are drawing a statute now, and legislative intent is very important. As the chief sponsor, your views on this are critical; and therefore I would like to know your view rather than just pass the ball to the court....
>
> Does H.R. 2797 protect conduct compelled by religious belief or conduct motivated by religious belief? You see the difference....
>
> Rep. Solarz: .... I would be reluctant to limit it to actions compelled by religion as distinguished from actions which are motivated by a sincere belief. However...
>
> Rep. Hyde: Now we are getting to it. All of this stuff about being compelled is really beside the point. It is, someone who says my religion nudges me toward--I think it is compatible with my religion to have an abortion. That is motivated. And that is protected by your bill.
>
> Rep. Solarz: No, it isn't.

Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 102d Cong., 2d Sess. 1 (1992) (hereinafter Hearings on H.R. 2797). Representative Solarz recognized that this colloquy did not resolve the issue and later

clarified his views in a letter to subcommittee chairman Don Edwards that was included in the record of the act. Solarz indicated that he believed the drafters envisioned a religiously motivated test:

> Were Congress to go beyond the phrasing chosen by the drafters of the First Amendment by specifically confining the scope of this legislation to those practices compelled or proscribed by a sincerely held religious belief in all circumstances, we would run the risk of excluding practices which are generally believed to be exercises worthy of protection.

Hearings on H.R. 2797 at 128-30. Representative Solarz also quoted a letter written by professors Michael McConnell, Douglas Laycock and Edward McGlynn Gaffney in support of this position:

> It is difficult to capture the idea of the dictates of conscience in statutory language because different theological traditions conceptualize the force of [God's] moral order in different ways. Some treat it as a binding moral law, others view it as an expression of [God's] will, which believers freely conform to out of love and devotion to [God]. ...it would be a mistake to tighten the language of the Act by confining it to conduct "compelled by religious belief."

Id. at 129; see also Muslim, 897 F. Supp. at 218-219. This aspect of the debate became muted after the Supreme Court issued its opinion in Casey and it does not appear that Congress returned to it again after the Casey decision.

Although Representative Solarz's statements are supportive of a religiously motivated test, his views are not fully indicative of Congressional intent on the point. Congress instructed courts to look to pre-Employment Division, Department of Human Resources v. Smith case

law for direction in interpreting free exercise claims under the act. See Goodall v. Stafford County School Board, No. 94-1586, 1995 WL 4425913 (4th Cir. July 27, 1995) ("[s]ince RFRA does not purport to create a new substantial burden test, we may look to pre-RFRA cases in order to assess the burden on the plaintiffs for their RFRA claim") Muslim v. Frame, 897 F. Supp. 215, is particularly persuasive on this question and seems to be the first judicial analysis of the relation of pre-Smith cases to this issue. Muslim involved a Muslim inmate's challenge to an institutional regulation that effectively prohibited him from wearing his prayer cap in the common areas of the prison. Examining the substantial burden question, the court found that although some cases characterized the religious practice as religiously mandated, others described it in terms of sincerely held beliefs, without offering any reasons for the distinction. Id. at 219-20 (citing cases).

Defendants acknowledge that there has been no consistent, established articulation of the substantial burden test but argue that the Supreme Court has always held that the religious belief or practice at issue must be more than just sincerely held. See Wisconsin v. Yoder, 406 U.S. 205, 218 (1972) (compulsory high school attendance law a threat to "essential part of [Amish's] religious belief and practice"). Defendants also contend that plaintiffs misconstrue "substantial burden" when they use it as a synonym for religious belief, citing Thomas v. Review Bd. of Indiana Employment Sec., 450 U.S. 707 (1981), and Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136 (1987). I do not read these cases as limiting free exercise inquiry to religiously compelled practices. Even Yoder does not fully support a religiously compelled test. See Ira C. Lupu, Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act, 56 Mont. L. Rev. 171, 203 (1995) (Amish faith did not mandate withdrawal of teenage children from school). Also, I do not understand plaintiffs to be arguing that they merely need to hold a religious belief to meet their threshold burden of proof. To

the extent that any pre-Smith cases employ a burden requirement blocking all non-compelled practices, Congress's remedial intent in passing the Religious Freedom Restoration Act argues against that approach. Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) (remedial statute should be construed broadly to effectuate its purposes).

Justice O'Connor's concurrence in Smith suggests that pre-Smith case law recognized a religiously motivated test and is cited approvingly in the Senate Judiciary Committee report accompanying the act. See Smith, 494 U.S. at 891-907 (O'Connor concurring); Senate Comm. on the Judiciary, Religious Freedom Restoration Act of 1993, S. Rep. No 111, 103d Cong., 1st Sess. 10 (1993), reprinted in 1993 U.S.C.C.A.N. 1892 [hereinafter Senate report]. Justice O'Connor wrote:

> Because the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must therefore be at least presumptively protected by the Free Exercise Clause. A person who is barred from engaging in religiously motivated conduct is barred from freely exercising his religion.

Smith, 494 U.S. at 893. Justice O'Connor does not cite any Supreme Court precedent in making these statements and thus does not fully articulate how cases before Smith analyzed the burden issue. Nonetheless, because the Senate Report makes clear its support for her position and because the language of the act tracks the test employed by Justice O'Connor, her opinion is relevant to Congressional intent. See Senate Report at 1896, 1899 n.17.

Commentators on the Religious Freedom Restoration Act agree with the position that a religiously motivated standard should be the applicable test. See

Lupu, 56 Mont. L. Rev. at 202; Laycock & Thomas, 73 Tex. L. Rev. at 232.[1] Lupu specifically rejects the "narrow" view that a person's exercise of religion is burdened only when there is a "direct legal prohibition against conduct religiously required," noting that Supreme Court precedent such as Wisconsin v. Yoder, 406 U.S. 205, a case defendants cite for this proposition, does not support a religiously mandated test. Id.; see also Douglas Laycock, RFRA, Congress, and the Ratchet, 56 Mont. L. Rev. 145, 151 (1995) ("The legislative history is dear that the conduct does not have to be compelled by religion").

The initial version of the Religious Freedom Restoration Act did not include the word "substantially" in its burden requirement. However, the addition of this word does not affect the applicability of the burden to religiously compelled or religiously motivated practices. Legislative history indicates that the inclusion of the word "substantially" was a "technical" amendment and a "clarification" that the act did not apply to governmental conduct that had an "incidental effect" on religious practices. 139 Cong. Rec. S14532 (daily ed. Oct. 26, 1993) (statements of Senators Hatch and Kennedy). Senator Hatch explained that the amendment was intended to make the statutory test "consistent with the case law developed by the Court prior to Smith," so that only action placing a substantial burden on the exercise of religion would be subject to the compelling interest test. Id. The Senate report noted that the act would not require justification for every government action having an incidental effect on religious practices. S. Rep. 111, reprinted in 1993 U.S.C.C.A.N. at 1898.

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[1] Professor Lupu has considered burden issues before. He is the author of the first article analyzing the history of the Supreme Court's burden requirement in free exercise cases. Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion, 102 Harv. L. Rev. 933 (1989).

Adopting a religiously motivated test has its pitfalls. Defendants contend that by adopting a religiously compelled test the courthouse doors would be flung open to RFRA claimants challenging all sorts of governmental action with minimal impact upon religious practice. Courts may have a more difficult time weeding out potentially frivolous claims and the government will be forced to justify its practices under the stringent compelling interest standard on a more regular basis. But such is the price Congress decided the government should pay in order to preserve the individual religious freedoms this country views as essential to liberty. Limiting free exercise inquiry to those practices mandated by certain religions places an unduly heavy burden on individuals attempting to assert their religious freedoms. As Representative Solarz noted, there may be important differences in the manner in which certain religions interpret divine guidance and moral persuasion. Certainly it is possible to envision a religion that furthers closeness to and understanding of the divine primarily through suggested rather than compelled practices. See Rust, 883 F. Supp. at 1306 n. 15 (Astrau religion teaches that source of holy wisdom is inside each individual and that sacred written sources contain examples of suggested conduct rather than commandments).

Recognizing the traps implicit in standards that involve subjective inquiries, I adopt the position of the court in Muslim and will apply a religiously motivated test.[2] Adoption of the religiously motivated test comports

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[2] The application of this test is at odds with this court's decision in Escobar v. Landwehr, 837 F. Supp. 284 (W.D. Wis. 1993). In Escobar, I held that an inmate could not state a valid First Amendment claim that prison officials were violating his right to possess crucifixes because he could not demonstrate that possession of a crucifix was essential to the exercise of his religion. Id. at 288. Although Escobar may have continued relevance to First Amendment claims, the Religious Freedom

with the Supreme Court's guidance that the judiciary avoid becoming embroiled in questions of theology. See Thomas, 450 U.S. at 716 ("Courts are not arbiters of scriptural interpretation"); Hernandez v. Commissioner, 490 U.S. 680, 699 (1989) (not within judicial ken to question the centrality of particular beliefs or practices to a faith or the validity of a particular litigants' interpretations of those creeds).

Thus, I find that plaintiffs' exercise of religion is substantially burdened if they can show that the burdened conduct or practice is 1) motivated by a sincerely held religious belief and 2) significantly or meaningfully curtailed. In the first step, the examination is whether the practice is a "person's exercise of religion." An individual must show that his belief is both sufficiently sincere and sufficiently religious. Proof of religiosity is especially important in the prison context because of the potential that prisoners might use religion as a pretext to achieve other goals. See Abbott Cooper, Comment, Dam the RFRA at the Prison Gate: The Religious Freedom Restoration Act's Impact on Correctional Litigation, 56 Mont. L. Rev. 325, 344 (1995). In the second step, the inquiry is objective, protecting the government from having to justify its regulations under a compelling interest standard if the burden on the asserted practice is incidental or de minimis. Such an objective inquiry is necessary to allow courts to distinguish between claims of minimal religious significance, such as throwing rice at church weddings and more consequential claims, such as the practice of getting married in church. See Smith, 494 U.S. at 887 n.4. (discussing necessity of a burden inquiry so that government would not have to justify its compelling state interest in regulating such inconsequential religious activities as rice throwing). In Thiry v. Carlson, 887 F. Supp. 1407, 1414 (D. Kan 1995), stay granted pending

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Restoration Act rejects the basis of that holding for claims brought under its provisions.

appeal, 891 F. Supp. 563 (D. Kan. 1995), the court applied such an inquiry in determining that the condemnation of a parcel of land containing the gravesite of the plaintiffs' stillborn child did not work a substantial burden on plaintiff's free exercise of religion. Although I am not certain I would have reached the same outcome as the court in Thiry, the application of a substantiality test is necessary to protect the government from the rice throwing type of cases.

The matter at hand is not a rice throwing case. Defendants premise their contentions on the argument that because wearing a cross and reading religious books other than the Bible are not compelled by any of the plaintiffs' faiths, plaintiffs' free exercise of religion has not been substantially burdened. Also, defendants contend that plaintiffs can view crosses in their respective prison chapels and can pursue their faiths without wearing a cross. With respect to the publication limitation, defendants argue that the regulation does not substantially burden plaintiffs' religious practices because the only essential book in their faiths is the Bible and they were not forced to give up that book; plaintiffs could have donated their religious books to the prison chapel and would have had access to those books through the prison's check-out system; and plaintiffs undermined the sincerity of their claims by keeping nonreligious books among their allotment of twenty-five publications. Plaintiffs assert that whether these practices are compelled is irrelevant; religious ornamentation has played an important role in many religions; the jewelry restriction affects their individual beliefs and ability to interact with God; and the presence of a cross in the prison chapel has no relevance to the exercise of religion outside the chapel. In addition, plaintiffs argue that the twenty-five publication limit operates as an infringement on the right to study religion; plaintiffs should not be forced to choose between maintaining religious books and legal books used to pursue their constitutional right of access to the courts; the prison

chapel's collection cannot adequately address the religious needs of each inmate; and donating their publications to the prison library is not an adequate alternative to maintaining individual possession of their books. Because the jewelry and publication regulations have affected the plaintiffs in different ways it is necessary to examine each of the regulations separately.

I have rejected defendants' primary argument, that the regulations do not impose a substantial burden on plaintiffs' exercise of religion because wearing crosses is not mandated by their faiths. Under a religiously motivated standard, religious requirements are irrelevant. Instead the focus is on the individual exercise of religion. See Thomas, 450 U.S. at 715-16 ("guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect"). The undisputed facts show that wearing a cross played an important role in the individual faiths of plaintiffs Sasnett, Smith and Miller. Plaintiffs wore their crosses at all times (except for plaintiff Miller who took her cross off when she bathed) because of sincere, religious beliefs that the crosses helped them to advance their faiths. Sasnett is a chapel employee who wants to become a minister, he wore his cross as a continuous reminder of his faith. Smith is a participant in prison bible study and a chapel band, who believes that the cross helps him to get to know God and deal with other people better. Miller feels closer to God when she wears her cross.

Defendants concede that plaintiffs hold these beliefs and that they are sufficiently religious but argue that the crosses to which plaintiffs have access in their respective prison chapels should satisfy their desire for that religious symbol. In making this argument, defendants misconstrue the nature of plaintiffs' claim. Occasional access to a communal cross hanging on a wall in the prison chapel is not the same as continual individual possession of an item used for personal and private devotion. See Muslim, 897

F. Supp. at 217 (government cannot limit particular exercises of religion by pointing to other religious practices that remain available). It is similarly irrelevant that plaintiffs can maintain their faith in God without wearing the crosses and that plaintiff did not wear crosses from the initial point prison regulations allowed such wearing.

The burden on plaintiffs' individual religious free exercise is substantial. Religious ornamentation and symbols have held great significance to members of a variety of religions, both historically and today. Courts have recognized the potential importance of medicine bags and hawk feathers to those practicing Native American shamanism, see Werner, 49 F.3d at 1481 (religious symbols play important role in expressing an individual's adherence to a particular faith); wearing prayer caps to Muslims, see Muslim v. Frame, 891 F. Supp. at 231; Hall, 896 F. Supp. at 1047; and wearing religious beads to adherents of the Santeria religion, see Campos v. Coughlin, 854 F. Supp. 194, 212 (S.D. N.Y. 1994). The plaintiffs' crosses allow them to feel closer to and to better understand God. Preventing plaintiffs from keeping their crosses is not the type of minor or de minimis incursion with which Congress was concerned in passing the Religious Freedom Restoration Act. Failing to apply free exercise scrutiny to this practice would thwart the remedial purposes of the act. It is unlikely that if Congress were to pass a law effectively prohibiting all-American citizens from wearing any type of religious ornamentation, the Supreme Court would refuse to apply free exercise inquiry on the ground that the law did not substantially burden religious freedoms. The same should hold true here. The fact that these plaintiffs are prison inmates has no bearing on the substantial burden inquiry, although it may be critical to the application of the compelling interest test.

Unlike the jewelry restriction, the publication limit does not impose a substantial burden on plaintiff Sasnett

or on plaintiffs Lowery and Hadley. I acknowledge that plaintiff Sasnett gave up books that he used in his course of study to become a minister, that plaintiff Lowery relinquished bible study materials in order to maintain his collection of legal self-help manuals and that plaintiff Hadley sent out pamphlets that he was reading to further develop his religious understanding of the Jehovah's Witness faith. I do not question that these religious publications were of sincere importance to plaintiffs and that plaintiffs suffered when they relinquished them knowing that they could not be returned while plaintiffs were still in prison.

However, this is not the type of significant burden that Congress had in mind in passing the Religious Freedom Restoration Act. Plaintiffs were not forced to give up any specific books. Defendants set a limit and plaintiffs had the choice of which publications to retain within that limit. Plaintiffs could have kept all religious books and even could have donated the extra ones to their respective prison libraries with the possibility of checking them out at a later date. Plaintiffs did neither. They kept books on other subjects ranging from westerns to law books and gave their extra books to their ministers, relatives, and friends.

Plaintiffs contend that requiring them to relinquish any religious publications infringes on their right to study religion. Although the study of religion is important, I am unaware of any courts that have elevated it to a level of constitutional significance. The publication limitation may interfere to a certain extent with some inmates' abilities to engage in the study of religion but inmates can maintain up to twenty-five publications, a limitation that is rather generous.

Plaintiffs argue that they should not be required to give up other interests in order to pursue their religion and thus should be able to retain books on other subjects in

addition to their religious books. Plaintiff Lowery emphasizes this argument, claiming that he chose to keep only legal self-help books in addition to a single Bible and that prisoners have an acute interest in maintaining legal aids to help them pursue their constitutional right of access to the courts. Although prisoners have a constitutional right of access to the courts for pursuing post-conviction remedies and for challenging the conditions of their confinement, Campbell v. Miller, 787 F.2d 217, 225 (7th Cir. 1985), cert. denied, 479 U.S. 1019 (1986) (citing Bounds v. Smith, 430 U.S. 817 (1977)), a prisoner's Sixth Amendment right of access to the courts does not include individual ownership of legal manuals. In order to assert Sixth Amendment protection for retaining his legal books, plaintiff Lowery would need to show either actual prejudice or a direct and continual limitation on access to legal materials in the prison, something he has not attempted here. See Hossman v. Spradlin, 812 F.2d 1019, 1022 (7th Cir. 1987) (prisoner only temporarily or occasionally prevented from having any form of meaningful access to the courts must show prejudice in order to state a constitutional claim of denial of access to the courts); DeMallory v. Cullen, 855 F.2d 442, 448-49 (7th Cir. 1988) (plaintiff alleging direct and continuous limitation on access to legal materials does not need to assert instances of specific prejudice). Plaintiff Lowery may very well have access to similar legal self-help manuals in the prison's library.

Plaintiffs had the option of donating the books to the prison chapel and could have maintained access to them in that way. Even if plaintiffs had been transferred to another institution, they could have continued to check out the books through the interlibrary loan system. By donating books to the prison libraries, plaintiffs would have ensured their accessibility, even if they had to share them occasionally with other inmates.

The publication limitation is a far less onerous burden on plaintiffs' free exercise of religion than the jewelry restriction. The jewelry regulation operates as a complete ban on plaintiffs' ability to wear a cross or crucifix. On the other hand, the publication limitation does not act as an absolute prohibition on plaintiffs' free exercise rights but only as a partial limitation and a minor inconvenience. See Weir v. Nix, 890 F. Supp. 769, 789 (S.D. Iowa 1995) (finding a similar twenty-five book limitation in Iowa correctional system did not impose a substantial burden on plaintiffs' free exercise rights). Plaintiffs retain the opportunity to maintain twenty-five religious books to study and enjoy and can gain access to additional books through the prison library.

2. Compelling interest - least restrictive means

Because plaintiffs have established that the jewelry regulation imposes a substantial burden on their free exercise of religion, defendants must prove that their regulation of that conduct is the least restrictive means of achieving a compelling governmental interest. Defendants contend that even if the jewelry rule substantially burdens plaintiffs' religious exercise, the undisputed facts establish that the rule furthers legitimate and compelling purposes: the jewelry restriction is rationally related to the compelling goal of prison order, safety and discipline and the legislative history of the Religious Freedom Restoration Act indicates a congressional intent to continue a policy of judicial deference to prison officials by deeming nearly all prison regulations to fulfill compelling interests. Defendants offer the following compelling interests in support of their prison property regulations: 1) reduction of the risk and consequences of a fire; 2) alleviation of the impact of prison overcrowding; 3) reduction of the costs associated with storage, transportation and reimbursement of inmates' personal belongings; 4) increase in the safety and security of the prison by reducing the number of places available to hide contraband; 5) prohibition of the

possession of property known to be used as gang insignia; and 6) reduction of inmate possession of valuable property that is often used for barter and can lead to strong arming. Only these last two interests apply to the jewelry restriction. Plaintiffs contest each of these interests in turn and argue that the Religious Freedom Restoration Act was not intended to be a rubber stamp for prison official decisions.

The Religious Freedom Restoration Act states that one of its express purposes is to:

> restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened.

42 U.S.C. § 2000bb(b)(1). In Sherbert, 374 U.S. at 402, the Supreme Court held that a law disqualifying a Seventh Day Adventist from receiving unemployment compensation benefits because she was unable to work on Saturdays for religious reasons violated the free exercise clause of the First Amendment. In Yoder, the Court found unconstitutional a Wisconsin law compelling formal education until age sixteen as it applied to Amish children. 406 U.S. at 234. Congress plugged the compelling interest standard articulated in these cases into the act almost verbatim. See Michael Stokes Paulsen, A RFRA Runs Through It: Religious Freedom and the U.S. Code, 56 Mont. L. Rev. 249, 250 n.4 (1995).

Congress found the return to the compelling interest test of Sherbert and Yoder especially necessary in the prison context. In O'Lone v. Shabazz, 482 U.S. 342 (1987), the Supreme Court had jettisoned strict scrutiny for prisoner free exercise claims, ruling that prison regulations impinging on prisoner's constitutional rights are valid if they are reasonably related to legitimate penological

interests. Id. at 349-50 (applying test announced a week earlier in Turner v. Safely, 482 U.S. 78 (1987)). Applying this test in O'Lone, the Court upheld a prison regulation effectively prohibiting several Muslims from attending religious services because the regulation was reasonably related to prison interests. Id. at 351-52. The Senate report accompanying the Religious Freedom Restoration Act explains that Congress rejected the standard applied in O'Lone and intended to "restore the traditional protection afforded to prisoners to observe their religions" that existed before O'Lone. S. Rep. 111, reprinted in 1993 U.S.C.C.A.N. at 1899.

A rejection of the O'Lone test does not necessarily mean that the compelling interest test has the same meaning in prisons as it does in other contexts. See Lupu, 56 Mont. L. Rev. at 191. In the years between the decisions in Yoder and O'Lone, the Court acknowledged the interests of states in maintaining internal order and security in their penological institutions. See, e.g., Bell v. Wolfish, 441 U.S. 520 (1979); Jones v. North Carolina Prisoners' Union, Inc., 433 U.S. 119 (1977); Procunier v. Martinez, 416 U.S. 396 (1974). The Senate report recognizes the Court's tradition of "due deference to the experience and expertise of prison and jail administrators" and explains that the committee did not intend the act "to impose a standard that would exacerbate the difficult and complex challenges of operating the Nation's prisons in a safe and secure manner." S. Rep. 111, reprinted in 1993 U.S.C.C.A.N. at 1899-1900. However, the committee report continues with the following statement:

> At the same time, however, inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements.

Id. at 1900. Thus, although the plain language of the Religious Freedom Restoration Act does not declare that the compelling interest test applies any differently in the prison setting than in other arenas and contains no directions to analyze prisoner cases under less rigorous standards, the legislative history indicates that setting is important. Id. at 1898. ("This single test, however, should be interpreted with regard to the relevant circumstances in each case"). Other legislative history supports this conclusion. See Cooper, 56 Mont. L. Rev. 325 (compiling legislative history relevant to prisoner claims under the act). However, an exhaustive summary is not needed to determine that although Congress did not include any specific language in the act, it intended the interests and goals proffered by prison officials to be given high regard unless they appeared patently off base.

A compelling interest is one "of the highest order." Church of the Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217, 2233 (1993). The undisputed facts show that defendants imposed the property regulations in order to achieve prison order, safety and discipline. Courts have found these goals compelling. United States v. Slaughter, 900 F.2d 1119, 1126 (7th Cir. 1990) (compelling state interest in law enforcement and public safety); Chambers v. Ingram, 858 F.2d 351, 360 (7th Cir. 1988) (compelling state interest in protecting the safety of others); Azeez v. Fairman, 604 F. Supp. 357, 363 (C.D. Ill. 198[illegible]), rev'd on other grounds, 795 F.2d 1296 (7th Cir. 1986) (prison security, discipline and administration are compelling state interests by definition). Plaintiffs raise interesting arguments that the more immediate goals of improving fire safety, easing overcrowding, reducing storage costs, reducing places to hide contraband, prohibiting possession of gang insignia property, and decreasing the amount of valuable property that leads to prisoner strong arming are not rationally related to the prison's overall order, safety and discipline goals because of their facial underinclusiveness, but defendants have offered ample

evidence of the reasons behind the regulations and plaintiffs have not provided enough evidence to raise a genuine dispute as to the compelling nature of these stated goals.

Nonetheless, defendants have failed to show that the complete prohibition on jewelry is the least restrictive means of achieving their compelling goals. Defendants argue that they gave the property regulations careful and exhaustive consideration and support this claim with considerable evidence of prison official involvement in resolving the problem of access property and gangs in the prisons. It is undisputed that defendants spent substantial time considering the property regulations. The inmate property work group examined property problems in detail over the course of several years, eventually recommending the jewelry and publication restrictions implemented by the Department of Corrections. However, plaintiffs cannot carry their burden of showing that their chosen methods of addressing the property problems are the least restrictive possible means to achieve their goals merely by pointing to the amount of time and energy spent in contemplation of the regulations. Other courts have found regulations invalid under the Religious Freedom Act when prison officials have not implemented the least restrictive means to realize compelling interests in prison safety. See, e.g., Alameen, 892 F. Supp. at 450 (complete prohibition on display of black religious beads not least restrictive means of furthering compelling interest in preventing gang violence); Campos, 854 F. Supp. at 208 (complete prohibition on Santeria beads arguably not least restrictive means when inmate is willing to wear beads under his clothing); Lawson v. Dugger, 844 F. Supp. 1538, 1545 (S.D. Fla. 1994)(outright ban on Hebrew Israelite literature is greater than necessary restriction on inmate's free exercise of religion).

Plaintiffs argue that other institutions dealing with analogous problems have achieved similar goals with less

restrictive alternatives. For example, with respect to religious jewelry, the United States Bureau of Prisons allows inmates to wear or use personal religious items during devotional services and within the institution if the warden grants permission. 28 C.F.R § 548.12(f). Another court has suggested that the less restrictive alternative of wearing religious jewelry under one's clothing takes away the symbol's potential of showing gang allegiance while at the same time preserving a matter of personal religious significance. See Campos, 854 F. Supp. at 208. Plaintiffs suggest a number of other alternatives that would fulfill their religious aspirations and allow prison officials to achieve their goals at the same time.

In analyzing these proffered alternatives, I am mindful of the need for courts to treat the decisions of prison officials with deference and respect. See Johnson v. Phelan, No. 93-3753, 1995 WL 621777 at *1 (7th Cir. Oct. 24, 1995) (animating theme of Supreme Court's prison jurisprudence for last twenty years is that judges should respect hard choices made by prison administrators). But deference and respect do not mean that courts should refrain from becoming involved when inmates' important constitutional interests are being impinged.

Defendants' legitimate concern for prohibiting the wearing of valuable jewelry can be met by imposing a limit on the value of such jewelry or by providing inexpensive versions to inmates for purchase. In addition, defendants' concerns about gang identification can be addressed by requiring that religious jewelry be worn under clothing and removed for showering. I offer these suggestions as no more than that. It is up to defendants to determine exactly what steps they will take to comply with this decision.

Having determined that the Religious Freedom Restoration Act does not offer plaintiffs their desired relief on the twenty-five publication limit, I turn to plaintiffs'

remaining claims to determine whether they warrant a grant of relief.

B. First Amendment

Plaintiffs are correct in noting that prisoners do not leave their First Amendment rights at the prison gates, Al-Alamin v. Gramley, 926 F.2d 680, 686 (7th Cir. 1991); Caldwell, 790 F.2d at 596, but following the Supreme Court's decisions in Turner, 482 U.S. 78, and O'Lone, 482 U.S. 342, prisoner free exercise claims are analyzed on a rational basis standard. According to O'Lone, a "regulation must have a logical connection to legitimate governmental interests invoked to justify it." 482 U.S. at 350. This rational basis standard is far more deferential to prison officials than the test established by the Religious Freedom Restoration Act. See Williams v. Lane, 851 F.2d 867, 877 (7th Cir. 1988)(setting forth four-part summary of Turner-O'Lone test). Because plaintiffs have failed under the more liberal standard of the act, they cannot succeed on their First Amendment claim. Even if I had determined that defendants' stated goals were not compelling, their property regulations are rationally related to legitimate governmental interests.

C. Fourteenth Amendment

Plaintiffs contend that they have liberty interests in the possession of crucifixes and religious books above the twenty-five publication limit and that defendants have deprived them of due process in denying them these items. Plaintiffs' due process claim is essentially just another ground on which they attempt to stand in making arguments that were addressed in the discussion of their Religious Freedom Restoration Act and First Amendment claims. It is extremely unlikely that defendants could establish liberty interests in these items after the Supreme Court's recent decision in Sandin v. Conner, 115 S. Ct. 2293 (1995). Even if they could, the Fourteenth

Amendment is not the proper basis for plaintiffs' free exercise claims. See Graham v. Connor, 490 U.S. 386, 395 (1989)(explicit textual source of constitutional protection, not Fourteenth Amendment, should be guide for analyzing claim).

D. Overbreadth

Plaintiffs argue that I should invalidate defendants' property regulations because they are overbroad.[3] The overbreadth doctrine allows a person who has engaged in conduct not protected by the Constitution to challenge his prosecution because the law under which he is being prosecuted might be used against other individuals whose conduct is protected by the Constitution. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503 (1985). Courts generally should not entertain overbreadth challenges when the parties challenging the facial validity of the statute are those who seek to engage in the activity that the overbroad law purports to punish. City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984).

This is not the type of case in which an overbreadth challenge is necessary. Plaintiffs are sufficiently representative of the individuals affected by the property regulations, making it unnecessary to engage in the speculative inquiry of the constitutional rights of other individuals that could be violated by the regulations. Plaintiffs do not suggest that the regulations are constitutional with respect to their religious conduct but are unconstitutional with respect to the religious practices of other inmates. Rather plaintiffs seek the contrary, a

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[3] Plaintiffs further contend that the court should find the property regulations void for vagueness but do not actively pursue this argument. Defendants' policies give inmates sufficient notice of the scope of prohibited conduct; indeed, plaintiffs characterize them as "abundantly clear and rigid." Therefore, plaintiffs' vagueness argument must fail.

ruling that the regulations are unconstitutional as applied to their own conduct. I have discussed plaintiffs' claims in adequate detail already and simply note that the overbreadth doctrine does not change the decision on those claims.

ORDER

IT IS ORDERED that defendants' motion for summary judgment is GRANTED and plaintiffs' motion for summary judgment is DENIED with respect to Internal Management Procedure DOC 309 IMP #4, the twenty-five publication limitation. Plaintiffs' motion for summary judgment is GRANTED and defendants' motion for summary judgment is denied with respect to Internal Management Procedure DOC 309 IMP # 1-D, the jewelry restriction.

IT IS FURTHER ORDERED AND ADJUDGED that:

1. Defendants' internal management procedure prohibiting the wearing of religious jewelry is declared to have violated, and to continue to violate, plaintiffs' rights under the Religious Freedom Restoration Act;

2. Defendants are enjoined from enforcing Internal Management Procedure DOC 309 IMP #1-D (jewelry prohibition) with respect to plaintiffs and any other persons who can demonstrate a sincere religious motivation for wearing such jewelry;

The clerk of court is directed to enter judgment in accordance with this order and to close this case, subject to its reopening, if necessary, to enforce the terms of this order and to grant further relief.

Entered this 1st day of December, 1995.

BY THE COURT:

/s/Barbara B. Crabb
BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

SYLVESTER SASNETT, WILL HIGHFILL, LONNIE SMITH, JAMES LOWERY, JAMES HADLEY, JOHN CASTEEL and BARBARA MILLER, et al., individually and on behalf of others similarly situated,

Plaintiffs,

and

UNITED STATES OF AMERICA,

Intervenor,

v.

DEPARTMENT OF CORRECTIONS of the STATE OF WISCONSIN, MICHAEL J. SULLIVAN, Secretary, Department of Corrections; KEN SONDALLE, Administrator, Division of Adult Institutions; JEFFREY ENDICOTT, Warden, Columbia Correctional Institution; GARY McCAUGHTRY, Warden, Waupun Correctional Institution, GERALD BERGE, Warden, Fox Lake Correctional Institution; KRISTINE KRENKE, Warden, Taycheedah Correctional Institution; their agents, assistants, officials, employees, successors and others acting in concert with them,

Defendants.

OPINION and ORDER

94-C-052-C

This is a civil action for injunctive and declaratory relief brought pursuant to 42 U.S.C. § 1983 and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb. Plaintiffs are Wisconsin state prisoners who challenge several internal management procedures, emergency rules and permanent administrative rules regulating the types and amounts of personal property they may possess while in prison. They contend that the enforcement of these procedures and rules violates their constitutional rights to due process, of access to the courts, to equal protection under the law and of free exercise of their religions under the Constitution and the Religious Freedom Restoration Act.[1] In addition, plaintiffs contend that the regulations are unconstitutionally vague and overbroad.

Defendants have moved pursuant to Fed. R. Civ. P. 12(b)(6) for partial dismissal of plaintiffs' claims on the grounds that 1) the complaint fails to state a Fourteenth Amendment due process claim because plaintiffs lack a legitimate claim of entitlement to the regulated property, 2) the complaint fails to state an access to courts claim because it does not include allegations from which prejudice might be inferred; 3) the claims brought pursuant to the Religious Freedom Restoration Act must be dismissed either because the act is unconstitutional or in the alternative, because plaintiffs have failed to allege deprivation of property "essential" to the exercise of their religions and the regulations further a compelling state interest; and 4) plaintiffs' allegations of denial of treatment awarded the plaintiffs in Braun v. Department of Corrections, No. 92-CV-3496, fail to state an equal protection claim. Finally, defendants contend that they are immune from liability for damages on all of plaintiffs' claims because the law defendants are alleged to have violated was not clearly established at the time.

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[1] The named plaintiffs represent a certified class of inmates on all claims except those alleging a denial of access to the courts and a violation of their rights of free religious exercise.

I conclude that defendants' motion must be granted with respect to plaintiffs' access to the courts claims and equal protection claims and denied in all other respects. Plaintiffs' amended complaint does not contain a request for money damages, making it unnecessary to reach the merits of defendants' qualified immunity defense. Because sovereign immunity bars claims brought directly against the state, defendant Department of Corrections will be dismissed on the court's own motion. Construing the amended complaint liberally, I find that it fairly alleges the following.

ALLEGATIONS OF FACT

Plaintiff Sylvester Sasnett is a prisoner at Columbia Correctional Institution in Portage, Wisconsin; plaintiffs Will Highfill and Lonnie Smith are incarcerated at Fox Lake Correctional Institution in Fox Lake, Wisconsin; plaintiffs James Lowery, James Hadley and John Casteel are imprisoned at Waupun Correctional Institution in Waupun, Wisconsin; and plaintiff Barbara Miller is currently incarcerated at the Outagamie County jail in Appleton, Wisconsin, but was a state prisoner at Taycheedah Correctional Institution in Fond du Lac, Wisconsin, during the period when defendants' challenged rules went into effect.[2]

Defendant Department of Corrections is a department of the State of Wisconsin. Defendant Michael Sullivan is the Secretary of the Department of Corrections. Defendant Ken Sondalle is the administrator of the Division of Adult Institutions of the Department of Corrections. Defendants Jeffrey Endicott, Gary

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[2] It is unclear whether Miller has any standing to sue because she is no longer incarcerated in a Wisconsin state prison and plaintiffs are not seeking monetary damages. However, on the present record, I cannot determine whether the challenged regulations still apply to her.

McCaughtry, Gerald Berge and Kristine Krenke are the wardens of Columbia Correctional Institution, Waupun Correctional Institution, Fox Lake Correctional Institution and Taycheedah Correctional Institution, respectively. All defendants are responsible for enforcing the rules and procedures of the Department of Corrections.

The Department of Corrections and individual prisons regulate and restrict inmates' rights to acquire and possess personal property by several means: administrative rules promulgated pursuant to chapter 227 of the Wisconsin Statutes; internal management procedures, which are not promulgated according to statute and are not legislative rules of conduct; emergency rules, which are published, but temporary, and not legislative rules of conduct; and institution handbooks containing various rules, internal management procedures and ad hoc policies or procedures. There may be overlap and variation among the administrative rules, internal management procedures and the institution handbooks.

On May 1, 1992, the administrator of the Department of Corrections, Division of Adult Institutions, issued a memorandum to all wardens and superintendents entitled "Revised Internal Management Procedures Relating to Inmate Personal Property and Clothing." The memo contained revised inmate personal property and clothing procedures that became effective on June 1, 1992, although inmates incarcerated on that date were given until June 1, 1993, to come into compliance. The changes included limiting the amount of personal and state-issued property an inmate may possess to that able to fit into a box no larger than 32" x 16" x 16" (excluding electronic equipment, typewriters, fans or other large items).

Under Internal Management Procedure DOC 309 IMP # 1-D, inmates are forbidden from wearing earrings, necklaces, bracelets, ankle bracelets and pins, including religious jewelry such as crucifixes. Internal Management

Procedure DOC 309 IMP #4 prohibits inmates from possessing more than 25 books, magazines, newspapers or periodicals, including religious publications, and requires that inmates purchase all reading materials through approved retail outlets or publishers. Under Internal Management Procedure DOC 309, IMP #1-B, computers are forbidden and typewriters, although permitted, may not have memory or text storage capability and must be purchased from approved retail outlets with the prior permission of prison officials. This rule requires inmates to rely on technologically inferior items that are increasingly difficult to obtain and increases the time required to prepare legal documents and requires inmates to store needed legal materials in hard copy form.

On August 31, 1992, the Wisconsin State Public Defender filed Braun v. Department of Corrections, No. 92-CV-3496, in Dane County Circuit Court on behalf of five inmates, one of whom is a litigant in this action (James Lowery), challenging the validity of the internal management procedures. On May 26, 1993, just before the compliance date for most prisoners, Dane County Circuit Judge Moria Krueger enjoined the Department of Corrections from enforcing the internal management procedures against the Braun plaintiffs on the ground that it was probable the procedures were not promulgated in accordance with state law. In response, on July 30, 1993, the Department of Corrections promulgated emergency rules restricting inmates' possession of personal property. On August 18, 1993, Judge Krueger granted the Braun plaintiffs' motion for summary judgment, holding that the internal management procedures were promulgated in violation of state law. Defendants did not apply the internal management procedures to the five named plaintiffs in Braun but did apply the procedures to all other inmates. The plaintiffs in Braun then challenged the emergency rule, and on or about September 17, 1993, the Braun defendants agreed by stipulation not to enforce the

emergency rules against them. The emergency rules were applied to all other inmates.

On June 1, 1994, the emergency rules expired and new permanent property rules went into effect. One of the rules, Wis. Admin. Code § DOC 309.35(3), directs prison wardens to develop policies and procedures relating to the acquisition, possession and use of personal property by inmates, to make a list of personal property items permitted at their institutions and to determine the permissible methods by which personal property may be acquired. Subsection (3)(d) forbids inmates from possessing more personal property than can fit into a receptacle 32" x 16" x 16", or 8192 cubic inches, excluding medically prescribed items, hobby materials, legal materials, electronic equipment, typewriters, fans or other "large items." Subsection (3)(e) requires that an inmate's hobby materials fit into a receptacle 14" x 14" x 14", or 2744 cubic inches, excluding one over-sized item. Subsection (3)(f) requires that an inmate's legal materials fit into a receptacle no larger than 20" x 20" x 20", or 8000 cubic inches, and allows wardens to authorize additional storage space on a temporary basis "upon a demonstrated need in connection with on-going litigation and consistent with fire codes and regulations." Wis. Admin. Code § DOC 303.47 provides for the discipline of inmates who possess contraband and defines contraband as any items not included on "the posted list" of permissible inmate possessions, items not listed on the inmate's property list and items not belonging to the inmate.

The Department of Corrections continues to use internal management procedures and informal policies in addition to permanent rules.

Because of the new property restrictions, plaintiff Sasnett was required to relinquish approximately eleven religious books, including The Amplified Bible, volumes 1 through 3 of the Jamison, Fauset Brown Commentary, the

Inductive Study Bible, the NIV Interliner Greek-English New Testament and the NIV Interliner Hebrew-English Old Testament. These religious books were sent out of the prison to or with Sasnett's pastor. Sasnett also gave up a gold crucifix on a 24" gold chain.

Plaintiff Highfill is currently preparing to bring a pro se habeas corpus challenge to his criminal conviction. Because of the threatened enforcement of the space restrictions on legal materials, Highfill sent large amounts of legal materials, including trial transcripts and research materials, out of the prison at a personal expense of over $100. Highfill was also forced to dispose of his memory typewriter. These restrictions made it more difficult for him to prepare his habeas case.

When plaintiff Lonnie Smith learned of the new property restrictions, he gave a visitor two gold chains with crosses on them, each made of 14 carat gold. Smith participated in church activities at Fox Lake Correctional Institution.

Plaintiff James Lowery was a plaintiff in the Braun case and therefore was not subject to either the internal management procedures or the emergency rules, but he is subject to the permanent rules. Because of the new rules, Lowery disposed of religious and legal books and magazines, legal reference materials and materials from a paralegal course. Lowery had spent approximately $800 to purchase the reading materials he gave up. He has filed an inmate complaint challenging the property restrictions.

In August or September 1992, plaintiff John Casteel shipped approximately eight shopping bags of legal materials from Waupun Correctional Institution at his own expense to comply with the property restrictions. He also gave legal research materials and photocopies of cases to a visitor. Casteel has two conditions of confinement cases pending before the Wisconsin Court of Appeals, another

case in Dodge County Circuit Court and an appeal from a criminal case in the Court of Appeals for the Seventh Circuit. Casteel is proceeding pro se in each case. Casteel has filed an inmate complaint regarding the property restrictions.

Because of the new rules, plaintiff James Hadley was forced to dispose of several Jehovah's Witness pamphlets. Plaintiff Barbara Miller gave her cross to a visitor in order to comply with the new restrictions on jewelry. Miller filed an inmate complaint to challenge the prohibition on wearing crosses. Her complaint was denied, appealed and denied again on the ground that the cross was gang related.

OPINION

In ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the court must construe the complaint in the light most favorable to plaintiffs, drawing all reasonable inferences in their favor. Ellsworth v. City of Racine, 774 F.2d 182, 184 (7th Cir. 1985); Mathers Fund, Inc. v. Colwell Co., 564 F.2d 780, 783 (7th Cir. 1977). The complaint need only comply with "notice pleading" standards: plaintiffs are required to do no more than give notice to defendants of their theory behind their claims and allege the basic facts supporting those claims. Maclin v. Paulson, 627 F.2d 83, 86 (7th Cir. 1980). Plaintiffs will be found to have stated a valid claim unless it appears beyond a doubt that they can prove no set of facts that would entitle them to relief. Harriston v. Chicago Tribune Co., 992 F.2d 697, 701 (7th Cir. 1992); Ellsworth, 774 F.2d at 184.

A. Due Process

The Fourteenth Amendment prohibits states from depriving persons of life, liberty, or property without due process of law. The constitutional protections afforded by

the due process clause are not extinguished upon incarceration. Hudson v. Palmer, 468 U.S. 517, 539 (1984) (O'Connor, J., concurring). A valid due process claim has three prerequisites: 1) a deprivation 2) of a property or liberty interest 3) by officials acting under color of state law. Parratt v. Taylor, 451 U.S. 527, 536-37 (1981).

Defendants' motion to dismiss plaintiffs' due process claims is grounded on their contention that plaintiffs lack a protectable interest in the property. According to defendants, the regulatory limits on inmates' ability to possess personal property define the degree to which the inmates possess an interest in their property; therefore, plaintiffs lack a legitimate claim of entitlement to possess any property proscribed by the rules. Plaintiffs respond that their due process claim does not extend to all property subject to the regulations at issue but only to religious and legal materials, as to which due process rights flow from both a property and liberty interest in the materials arising from the Religious Freedom Restoration Act and the First and Fourteenth Amendments.

For purposes of the due process clause, property interests must be found in state or federal law; they are not created by the Constitution. Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Thornton v. Barnes, 890 F.2d 1380, 1386 (7th Cir. 1989). To establish a property interest, plaintiffs would have to show that they have a "legitimate claim of entitlement" to the religious and legal property at issue. Roth, 408 U.S. at 577 ("To have a property interest . . . a person clearly must have more than an abstract need or desire."). A property interest exists in that which is "securely and durably [one's own] under . . . law, as distinct from what [one] hold[s] subject to so many conditions as to make [one's] interest meager, transitory or uncertain." Long Grove Country Club Estates, Inc. v. Village of Long Grove, 693 F. Supp. 640, 653 (N.D. Ill. 1988) (quoting Reed v. Village of Shorewood, 704 F.2d 943, 948 (7th Cir. 1983)). "Mere desire or expectation . . . falls

short of a constitutionally protected property interest." Cohen v. City of Des Plaines, 742 F. Supp. 458, 470 (N.D. Ill. 1990), rev'd on other grounds, 8 F.3d 484 (7th Cir. 1993).

Inmates have a property interest in their own personal possessions. Campbell v. Miller, 787 F.2d 217, 222 (7th Cir. 1986), cert. denied, 479 U.S. 1019 (1986). Defendants do not contest this but argue that plaintiffs have no legitimate property interest in possessing their personal property behind the prison gates. Plaintiffs make the untenable argument that an interest in possessing their property in prison arises from the First Amendment. Roth, 408 U.S. at 577. They also assert that property interests arise from the Religious Freedom Restoration Act, but the act has no bearing on plaintiffs' legal materials, and I conclude that it does not give rise to a cognizable property interest even with regard to plaintiffs' religious materials. Any asserted right to possess religious materials under the Religious Freedom Restoration Act would arise only from the property's link to the liberty of freely exercising one's religious practices. Plaintiffs do not point to, and I cannot identify any state law giving rise to a protectible property interest in the materials. To the contrary, state law embodies the prescriptions at issue. See Escobar v. Landwehr, 837 F. Supp. 284, 288-89 (W.D. Wis. 1993) (neither Wisconsin statutes nor the administrative code give rise to protectable property interest in materials banned under the new Internal Management Procedures). Therefore, I conclude that plaintiffs have no property interests in possessing the materials at issue.

Liberty interests are a different matter altogether. Unlike property interests, liberty interests can arise from the Constitution. Shango v. Jurich, 681 F.2d at 1097. The right to "liberty" guaranteed by the Fourteenth Amendment denotes a freedom "to worship God according to the dictates of [one's] own conscience," Roth, 408 U.S. at

572, as well as the right to petition the courts for redress. Williams v. Lane, 851 F.2d 867, 881 (7th Cir. 1988), cert. denied, 488 U.S. 1047 (1989). The Religious Freedom Restoration Act manifests a congressional intent to protect the liberty of free religious exercise embodied in the First Amendment. 42 U.S.C. § 2000bb(a) and (b). Therefore, if defendants are violating plaintiffs' right to gain access the courts or to exercise their religions, defendants are infringing upon constitutionally protected liberty interests. Williams, 851 F.2d at 880-81 (violation of inmates' rights of access to the courts and rights to freely exercise their religion constituted deprivation of liberty interests without due process), raising the question of what process is due.

In holding that plaintiffs may be entitled to due process, I express no views on whether the challenged restrictions are related reasonably to a legitimate governmental purpose. I hold only that plaintiffs may have a cognizable liberty interest in their religious and legal materials. Accordingly, defendants' motion to dismiss plaintiffs' due process claims is denied.

B. Access to the Courts

The law governing prisoners' rights of access to the courts has been clearly defined. Prisoners have a constitutional right of access to the courts for pursuing post-conviction remedies and for challenging the conditions of their confinement. Campbell v. Miller, 787 F.2d at 225 (citing Bounds v. Smith, 430 U.S. 817 (1977)); Wolff v. McDonnell, 418 U.S. 539, 578-80 (1974); Procunier v. Martinez, 416 U.S. 396, 419 (1974); Johnson v. Avery, 393 U.S. 483, 485 (1969). This right is significant, but not unconditional. Green v. Warden, U.S. Penitentiary, 699 F.2d 364, 369 (7th Cir. 1983), cert. denied, 461 U.S. 960 (1983). The constitutionally relevant benchmark is "meaningful" access, not total or unlimited access. Bounds, 430 U.S. at 823. "Meaningful" access has been interpreted as having access to an adequate law library or a lawyer,

but not necessarily both. Gometz v. Henman, 807 F.2d 113, 116 (7th Cir. 1986) (prison officials may eliminate one kind of protection - be it inmate writ-writers or prison libraries - if they supply adequate substitutes, such as lawyers).

An inmate forced to endure a "substantial and continuous" limitation on access to legal materials and counseling need not make a separate showing of individual prejudice caused by the state's interference with his constitutional right; however, an inmate who suffers only sporadic or insubstantial interference with his right of access to the courts must show how the interference caused him specific prejudice. Jenkins v. Lane, 977 F.2d 266 (7th Cir. 1992); DeMallory v. Cullen, 855 F.2d 442, 446 (7th Cir. 1988). In Jenkins, the Court of Appeals for the Seventh Circuit defined "substantial and continuous" to mean "any restriction on counsel or legal materials that completely prevents the prisoner, or a person acting in the prisoner's behalf, from performing preliminary research." 977 F.2d at 269. Under Jenkins, any claim of partial access puts the claim in a "minor or incidental" limitations category, requiring a showing of prejudice.

Will Highfill, James Lowery and John Casteel are the three plaintiffs who claim their access to the courts has been impaired. In these claims they challenge two distinct set of prison regulations: 1) the denial of computers and memory typewriters; and 2) the limits on the amount of legal materials an inmate may possess.

The computers and memory typewriter claims must be dismissed as a matter of law. The right of access to the courts incorporates a right to state-supplied pen and paper to draft legal documents, Bounds, 430 U.S. at 824, but does not require such sophisticated tools as computers and memory typewriters. See Sands v. Lewis, 886 F.2d 1166 (9th Cir. 1989) (no constitutional right to memory typewriters); cf. United States ex rel. v. Lane, 718 F.2d

226, 232 (7th Cir. 1983) (criminal defendant has no right of access to computerized legal research system upon forgoing right to court appointed counsel). The right of access does not mandate even the provision of ordinary typewriters. Jackson v. Arizona, 885 F.2d 639, 641 (9th Cir. 1989); Twyman v. Crisp, 584 F.2d 352, 358 (10th Cir. 1978); Wolfish v. Levi, 573 F.2d 118 (2nd Cir. 1978), rev'd on other grounds, 441 U.S. 520 (1978); Tarlton v. Henderson, 467 F.2d 200 (5th Cir. 1972); Inmates, Washington County Jail v. England, 516 F. Supp. 132, 140 (E.D. Tenn. 1980), aff'd without opinion, 659 F.2d 1081 (6th Cir. 1981).

Moreover, the asserted need for more technologically advanced machines is not a claim of a "substantial and continuous" limitation, see Jenkins, 977 F.2d at 269; therefore, it requires an allegation supporting an inference of prejudice. No such prejudice has been alleged here. Plaintiff Highfill says that the inability to use his memory typewriter has substantially burdened his ability to prepare a contemplated habeas case, and plaintiffs maintain that memory typewriters and computers quicken the pace of preparing legal documents, but these allegations are insufficient to satisfy the prejudice requirement. See Bruscino v. Carlson, 854 F.2d 162, 167 (7th Cir. 1988) (citing examples of prejudice as missing a statute of limitations deadline, failing to make a timely filing, being denied legal assistance or losing a case that otherwise could have been won), cert. denied, 491 U.S. 907 (1989); Howland v. Kilquist, 833 F.2d 639, 642-43 (7th Cir. 1987).

The challenge to the limit on legal materials an inmate may possess founders for the same reason. Plaintiff Lowery alleges that he had to mail out legal materials in response to the new rules, but he makes no allegation that these materials were essential to pursue a case or that he was otherwise prejudiced by the loss. Therefore, his claim will be dismissed. Plaintiffs Highfill

and Casteel are in a stronger position, because their allegations relate the loss of legal materials to contemplated or pending court cases. Generally, however, an active or contemplated lawsuit or appeal is insufficient to establish prejudice in and of itself. See Bruscino, 854 F.2d at 167. Plaintiffs have alleged that the property restrictions have "substantially burdened" their ability to prepare and prosecute their cases, but the allegation is conclusory. As the Court of Appeals for the Seventh Circuit made clear in Hossman v. Spradlin, 812 F.2d at 1021-22, ns. 2 and 6, an inmate who alleges only the loss of legal materials and a pending case has not satisfied the pleading requirements for showing prejudice. Plaintiffs must be able to allege "some quantum of detriment caused by the challenged conduct of state officials resulting in the interruption and for delay of plaintiff[s'] pending or contemplated lawsuit." Id. Plaintiffs' amended complaint makes no such allegation. Therefore, the access to courts claims will be dismissed.

C. Free Exercise of Religion

In 1990, the Supreme Court decided Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 875 (1990), a historic decision involving governmental burdens on the First Amendment right to free religious exercise. At issue was whether the "Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use." Holding in favor of the state, the Court clarified its view of free exercise doctrine: generally applicable laws that incidentally burden the free exercise of religion need never be justified by a compelling state interest; strict scrutiny is reserved only for those laws that specifically and intentionally target religious practices. Id. at 878, 885.

Views about Smith varied greatly. Some argued that it accurately depicted prior case law, resolving seeming inconsistencies into a coherent and consistent formula. See e.g., Philip A. Hamburger, A *Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915 (1992). Others characterized it as a judicial retrenchment. See, e.g., Smith, 494 U.S. 872, 891 (O'Connor, J., concurring in the judgment); and id. at 907 (Brennan, Marshall, Blackmun, JJ., dissenting); Matt Pawa, Note, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment*, 141 U. Pa. L. Rev. 1029, 1034-37 (1993).

For its part, Congress saw the case as retrenchment and responded in 1993 with the Religious Freedom Restoration Act. Finding that Smith "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion," 42 U.S.C. § 2000bb(a)(4), Congress attempted to restore what it perceived to be prior law regarding governmental interference with the free exercise of religion, see 42 U.S.C. § 2000bb(a)(5) and (b)(l). Borrowing language from Supreme Court precedent on free exercise doctrine, Sherbert v. Verner, 374 U.S. 398 (1963), and Wisconsin v. Yoder, 406 U.S. 205 (1972), Congress provided that "[g]overnment shall not substantially burden a person's exercise of religion" unless it demonstrates first that "application of the burden to the person" is the "least restrictive means" available to further a "compelling state interest." 42 U.S.C. § 2000bb-l(b). This rule is precisely the one rejected by the Supreme Court as the outer boundary of the free exercise clause.

Defendants contend that the Religious Freedom Restoration Act is unconstitutional, and in the alternative, that plaintiffs' claims should be dismissed because they are conclusory and because the regulations in question are supported by a compelling state interest. Because it is

appropriate to avoid addressing the constitutionality of a statute if possible, Cohen v. City of Des Plaines, 8 F.3d at 493, I will address the second set of arguments first. Plaintiffs Sasnett, Smith and Miller contend that the state's requirement that they give up their cross necklaces substantially burdens their religious exercise and plaintiffs Sasnett, Lowery and Hadley contend that relinquishing their religious books in response to the new rules has substantially burdened their religious practices, in violation of the Religious Freedom Restoration Act. Defendants argue that the claims should be dismissed because "plaintiffs have not alleged in a nonconclusory fashion facts from which this court could infer that the new rules have had a substantial impact on their sincerely held religious beliefs or activities." Defendants' argument highlights the sparseness of the allegations in plaintiffs' complaint: plaintiffs do not identify the religions to which they adhere or explain how their religious practice is substantially burdened by the regulations. However, plaintiffs have alleged that they were forced to give up materials of an obviously religious character, contending that this deprivation substantially burdens their religious exercise. Although plaintiffs could have done a better job of making their claim, defendants have been given sufficient notice of its general nature and I cannot conclude that no set of facts would entitle plaintiffs to relief. See, e.g., Campos v. Coughlin, 854 F. Supp. 194 (S.D.N.Y. 1994) (plaintiffs likely to succeed on merits of their claim that defendants violated Religious Freedom Restoration Act for failing to allow them to wear Santeria beads).

Defendants argue next that plaintiffs' claims should be dismissed because courts should defer to the decisions of prison administrators and interpret the "compelling state interest" defense broadly. There are at least three problems with this argument. First, whether an interest is compelling is a question of fact, not properly decided on a motion to dismiss. Second, the affirmative defense to a Religious Freedom Restoration Act claim has two prongs:

even assuming a compelling state interest, the interest may be furthered only by the least restrictive means necessary. See 42 U.S.C. § 2000bb-l(b). Defendants have not alleged, much less established, that the means employed here were the least restrictive necessary to further the state's interests. Finally, deference to prison administrators notwithstanding defendants must actually offer a rationale for their actions if they expect the court to find that rationale compelling, a task they have not attempted.

Because plaintiffs' claims have survived defendants' other arguments, I must reach the issue of the Religious Freedom Restoration Act's constitutionality. "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation." Baker v. Carr, 369 U.S. 186, 211 (1962); accord Rostker v. Goldberg, 453 U.S. 57, 64 (1981). The task requires this court to join an interbranch colloquy that began when the Supreme Court interpreted the Constitution and continued when Congress responded with the passage of the act.

I begin with the presumption that acts of Congress are constitutional. See Bowen v. Kendrick, 487 U.S.589, 617 (1988); Graham v. Richardson, 403 U.S. 365, 382-83 (1971). The key issue is whether § 5 of the Fourteenth Amendment gives Congress the power to pass legislation protecting the free exercise of religion to a greater degree than the Court is willing to read into the free exercise clause. Section 5 provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." It grants Congress a broad but not unlimited ability to legislate in furtherance of equal protection and the Civil War amendments. Supreme Court precedent indicates that § 5 applies fully to the earlier amendments as well. Hutto v. Finney, 437 U.S. 678 (1978) (civil rights

attorney's fees award statute, 42 U.S.C. § 1988, upheld as valid exercise of Congress' power under § 5 as applied to litigation of Eighth Amendment claim); see also Belgard v. State of Hawaii, 1995 U.S. Dist. LEXIS 4903, No. 93-00961 (D. Haw. Feb.3, 1995).

When exercising its powers under the Civil War amendments, Congress can prohibit behavior that the Supreme Court has not defined previously as unconstitutional. For example, in City of Rome v. United States, 446 U.S. 156 (1979), the Supreme Court upheld § 5 of the Voting Rights Act, which prohibits electoral system changes that carry a racially discriminatory impact, as a valid exercise of Congress's power under the Civil War Amendments, notwithstanding the Court's construction of the Fifteenth Amendment as prohibiting only those voting schemes that are motivated by an intent to discriminate. The Court stated,

> [T]he Act's ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the Fifteenth Amendment, even if it is assumed that § 1 of the Amendment prohibits only intentional discrimination in voting. Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact.

Id. at 177 (citing Katzenbach, 383 U.S. at 335, and Oregon v. Mitchell, 400 U.S. at 216 (opinion of Harlan, J.)). The issues raised in City of Rome are closely analogous to those raised in this case. In both instances, a constitutional provision has been interpreted by the Court as prohibiting only intentionally discriminatory state action and Congress

has filled what it considered to be a gap in federal protection by creating a prophylactic buffer zone around the right at issue. In both instances, the buffer zone dispenses with the need to prove state actors' motives simply by prohibiting all state action with discriminatory impact. See also Oregon v. Mitchell, 400 U.S. 112 (1970) (upholding Congress's complete prohibition of voting literacy test while declining to hold that the Constitution requires such a prohibition); Katzenbach v. Morgan, 384 U.S. 641 (1966); South Carolina v. Katzenbach, 383 U.S. 301 (1966).

Defendants argue that the Religious Freedom Restoration Act is different from other valid exercises of § 5 authority in one key respect: unlike prior congressional enactments, the Religious Freedom Restoration Act is an attempt to force an interpretation of the Constitution onto the federal judiciary, thus violating the separation of powers doctrine and Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 177 (1803) (holding that it is "the province and duty of the judicial department to say what the law is"). Defendants point to the use of the term "restoration" in the act's title, the act's reliance on "constitutional" language from the Sherbert and Yoder decisions, and the references in the legislative history to the drafters' dissatisfaction with Smith.

It is true that the Religious Freedom Restoration Act reflects hostility toward the Smith decision: Congress was unhappy with Smith, as were many members' constituents, and wanted to avoid what it perceived to be the decision's disastrous effects. But Congress did not display an unequivocal intent to overturn Smith by reinterpreting the First Amendment. The legislative history supports an intent to create statutory rights as much as a motive to redefine constitutional ones. See H.R. Rep. No. 88, 103rd Cong., 1st Sess. at 1 (1993) (the Religious Freedom Restoration Act creates a "statutory right" . . .) and at 9 (". . . the legislative branch has been

given the authority to provide statutory protection for a constitutional value when the Supreme Court has been unwilling to assert its authority") and at 15 n.3 ("the label 'restoration' in this context is inappropriate. Congress writes laws--it does not and cannot overrule the Supreme Court's interpretation of the Constitution and thus it is unable to 'restore' a prior interpretation of the First Amendment"); S. Rep. No. 111, 103rd Cong., 1st Sess. at 2 (1993) (the Religious Freedom Restoration Act creates a "statutory prohibition" against government action). As for Congress's use of the term "restoration," as a matter of semantics there is no reason why Congress could not statutorily "restore" the compelling state interest test: the statute giveth what in Congress's eyes the Supreme Court taketh away.

Even assuming it were possible to pinpoint a singular congressional intent, see Frank H. Easterbrook, *Statutes' Domains,* 50 U. Chi. L. Rev. 533, 547-48 (1983) (attacking the notion that legislation stems from a "coherent collective choice"), and conclude that Congress attempted to engage in substantive constitutional interpretation, that conclusion would not necessarily jeopardize the act. In Katzenbach v. Morgan, 384 U.S. at 652, the Court upheld § 4(e) of the Voting Rights Act, which prohibited certain applications of state voter literacy requirements, as a valid exercise of § 5 authority and did so in the absence of any judicially defined constitutional wrongdoing. The Court justified its holding on two grounds: 1) Congress may have determined that the prohibition was necessary to fully enforce the 14th Amendment; or 2) Congress may have determined that the literacy tests at issue constituted an independent violation of the equal protection clause. Id. at 656. The first rationale is known as Morgan's "remedial" theory of Congress's power under § 5, and it grants Congress the power to remedy or root out unconstitutional activity by prohibiting otherwise constitutional activity. The second holding, representing the Court's "substantive" theory of §

5 authority, assumes Congress can shape the outer contours of the Constitution. "This rationale--the 'second Morgan rationale'--holds that Congress can expressly disagree with the Court as to the reach of constitutional rights." Pawa, *Can Congress Save Us?*, supra, at 1061. The only limit Morgan placed on this interpretive power was that Congress may not "restrict, abrogate, or dilute" any constitutional guarantees in the process. Id. at 65 n. 10.

The analogy between the facts of Morgan and those presented here is compelling. Seven years before the Morgan decision, the Supreme Court had determined that a state's requirement of a literacy test did not violate the Constitution absent a showing of an intent to discriminate. Lassiter v. Northhampton Election Bd., 360 U.S. 45 (1959). Notwithstanding that earlier opinion, the Court upheld the Voting Rights Act as a valid exercise of Congress's powers under § 5 but declined to overturn Lassiter. Morgan, 384 U.S. at 649. Lassiter was to the Voting Rights Act what Smith is to the Religious Freedom Restoration Act. In each instance, the Supreme Court had held that states were free to take certain actions that impinged on the ability of individuals either to vote (Lassiter), or to practice their religions (Smith), and Congress took action to bolster the federal protection of that right. See also Oregon v. Mitchell, 400 U.S. 112 (upholding a nationwide ban on state, literacy requirements as prerequisites to voting without overturning Lassiter). Even assuming a greater degree of congressional hostility toward Supreme Court precedent in this instance than in the area of voting rights, I can think of no reason to afford such a distinction constitutional significance.

Defendants argue that case law following Morgan has abrogated any interpretive powers Congress once had under § 5. See Oregon v. Mitchell, 400 U.S. 112 (1970); EEOC v. Wyoming, 460 U.S. 226 (1983). Neither of these

two decisions, however, abrogates Morgan's substantive theory or dictates an outcome in this case. In the splintered Mitchell decision, the Court unanimously sustained the 1970 amendments to the Voting Rights Act banning literacy tests in state and federal elections, and with five concurring judgments, upheld a provision to lower the voting age from 21 to 18 in federal elections and struck the same provision as applied to the states. No clear majority either endorsed or rejected the view that Congress has substantive powers under § 5, although four justices held explicitly that Congress could define the equal protection clause substantively. Mitchell, 400 U.S. at 141-44 (Douglas, J.); id. at 280-81 (Brennan, J., joined by White and Marshall, JJ.). Indeed, it may be a mistake to read the several opinions of Mitchell beyond the facts of that case, which entailed a federal attempt both to define the equal protection clause in teens wholly unrelated to prior Court precedent and to define state voting qualifications, a core area of state sovereignty as set out in the Constitution itself. See Pawa, *Can Congress Save Us?*, supra, at 1074 ("if Mitchell does represent a limitation [on Congress's powers under § 5], it is only a limitation on Congress's ability to remedy non-racial discrimination in situations where the Tenth Amendment or other constitutional provisions reserve power to the states").

In EEOC v. Wyoming, 460 U.S. 226, the Court upheld application of the Age Discrimination in Employment Act to state and local governments as a valid exercise of Congress's powers under the commerce clause, but the dissenters, including Justices Rehnquist and O'Connor, would have declared it invalid under both the commerce clause and § 5. The dissenting justices considered the Age Discrimination in Employment Act an unconstitutional exercise of Congress's remedial powers under § 5 primarily because the Court had never held that the equal protection clause extends to classes defined by age. Id. at 260.

A dissenting opinion is not binding precedent; Morgan is. Furthermore, the justices who dissented in EEOC v. Wyoming declined explicitly to reach the issue whether Congress has substantive powers under § 5: "The ability of Congress to define independently protected classes is an issue that need not be resolved here . . . ." Id. n.6; see also id. at 263 ("even were we to assume, arguendo, that Congress could redefine the Fourteenth Amendment . . ."). Because Congress excepted the federal government from the act's coverage, the dissenters were prepared to strike the act as unconstitutional, reasoning that whatever authority Congress had to create constitutional rights did not permit it to extend those rights to some government employees but not others. Id. Because the Religious Freedom Restoration Act applies to the federal government in full, it does not suffer from this potential constitutional infirmity. Although the dissent may be prophetic in its less expansive vision of Congress's § 5 powers and although current members of the Supreme Court have expressed a range of individual viewpoints on Congress's § 5 authority, see Adarand Constructors, Inc. v. Pena, No. 93-1841, 1995 US LEXIS 4037, at *56 (June 12, 1995), I am not persuaded that the Supreme Court would hold that Congress has lost its interpretive abilities under § 5 to expand constitutionally guaranteed liberties. See Belgard v. State of Hawaii, 1995 U.S. Dist. LEXIS 4903.

Even if Congress does lacks the power to interpret the Constitution under § 5, the Religious Freedom Restoration Act is best justified as an exercise of Congress's remedial powers under § 5. Under this view of the legislation, Congress has not attempted to define the First Amendment; rather, it has merely prohibited otherwise lawful activity as a means of further enforcing constitutional rights. As stated in City of Rome, 446 U.S. at 177, the proper question is whether Congress could have concluded "rationally," on the basis of the information before it, that neutral regulations with a discriminatory effect "create the risk of purposeful discrimination." So

long as the Religious Freedom Restoration Act can be seen as a buffer zone designed to protect and facilitate full enjoyment of the constitutional right to free religious exercise, it does not matter whether Congress was concerned independently with prohibiting behavior that does not violate the free exercise clause.

It seems obvious that the Religious Freedom Restoration Act is a rational means of safeguarding the core constitutional right to free exercise, as judicially defined. Only intentionally discriminatory state actions violate the First Amendment, and it is difficult to prove intentional discrimination. This nation's history is replete with examples of facially neutral, generally applicable laws intended to curb religious practices. Senate Hearings at 70-71, 129; 1992 House Hearings at 332-38. As the United States notes in its brief, "Th[e] testimony [before Congress] established not only that governmental motive is rarely overt, but also that judicial reluctance to impugn the intentions of state actors facilitates the concealment of illicit motive." See H.R. Rep. No. 88 at 6 ("legislative motive often cannot be determined and courts have been reluctant to impute bad motives to legislators"); Testimony of Prof. Laycock, Senate Hearings at 95-96 ("Religious minorities are no safer than racial minorities if their rights depend on persuading a federal judge to condemn the government's motives"); Testimony of Nadine Strossen, American Civil Liberties Union, id. at 183 ("As members of this committee know from its experience in the field of civil rights, it is much more difficult for someone to prove discriminatory intent than to prove discriminatory effect"). Congress determined that requiring plaintiffs to prove that state actors intended to discriminate on the basis of religion creates an evidentiary barrier to the full protection of constitutional rights. It therefore dispensed with this requirement when it passed the Religious Freedom Restoration Act. It was wholly rational for Congress to have concluded that the Religious Freedom Restoration Act

would add greater protection to First Amendment guarantees.

It is worth emphasizing that the only way that the Religious Freedom Restoration Act substantively altered the scope of federal rights to free religious exercise was by obviating proof of discriminatory intent on the part of state actors. Those who see the act as a dramatic intrusion into the judiciary's sphere of constitutional interpretation may overlook the minimal nature of the changes really effectuated. The Religious Freedom Restoration Act came in response to Smith, but it does not reflect an interbranch rift over the definition of the underlying right to free exercise of religion. In Smith, the Court concerned itself only with what the First Amendment "prohibited." The Court did not find that religiously inspired peyote use did not fall within the amendment's definition of free exercise; it determined simply that only laws intended to inhibit religious practice actually "prohibit" free exercise, as that term is used in the First Amendment. Although it may be hard to distinguish between an underlying right on the one hand, and the constitutional protection afforded that right on the other, in this instance that distinction was made in Smith itself. As its stands currently, there appears to be no disparity between the Court's and Congress's view of the underlying right. See Smith, 494 U.S. at 877-88 ("the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation."); 42 U.S.C. § 2000bb-2(4) ("the term 'exercise of religion' means the exercise of religion under the First Amendment to the Constitution.") This fact distinguishes the Religious Freedom Restoration Act from the legislative activity at issue in Mitchell and EEOC v. Wyoming, where Congress was attempting to prohibit certain types of age discrimination even though the Court had never ruled that age was a suspect classification or

that the equal protection clause protected against such discrimination. See EEOC v. Wyoming, 460 U.S. at 261 n.7 (Burger, J., dissenting) (rejecting the government's argument that by applying the rational basis test in prior case law, the court had agreed sub silentio that age discrimination was protected by the equal protection clause). Here there is a much stronger nexus between the judicially defined right and the statutory enforcement of that right.

Before concluding that the Religious Freedom Restoration Act is a valid exercise of Congress's powers under § 5 of the Fourteenth Amendment, I must consider whether the act violates some other provision of the Constitution. Morgan, 384 U.S. at 651 n.10. Defendants argue that it does because it imposes a rule of decision on the courts, thereby violating the constitutional separation of powers doctrine. It has been more than a century since the Supreme Court has struck an act of Congress as an unconstitutional rule of decision. In United States v. Klein, 80 U.S. (13 Wall.) 128 (1871), the Court reviewed amendments to a statute that allowed Union loyalists to recover property seized during the Civil War, but denied that opportunity to supporters of the confederacy whose claims of loyalty rested on presidential pardons (individuals whom the Court had previously declared fit the statutory definition of "loyalist," see United States v. Padelford, 76 U.S. (9 Wall.) 531 (1870)). Congress excluded the pardoned southerners by adding a provision instructing the Court of Claims to dismiss their claims for want of jurisdiction. The Court found the amendment unconstitutional because it forbade a federal court from giving "the effect to evidence which, in its own judgment, such evidence should have." Id. at 146-48.

For present purposes, the salient aspect of the congressional activity at issue in Klein was the attempt to scale back federal courts' jurisdiction to mandate a particular adjudicatory outcome. Klein does not prevent

Congress from charging the courts to apply standards of conduct to state actors. If Klein's holding were as broad as defendants maintain, hundreds of federal statutes would be constitutionally suspect because, through them, Congress has imposed a statutory standard that the judiciary is charged with upholding. Unlike the statute in Klein, the Religious Freedom Restoration Act merely imposes a standard of conduct on state actors, not a rule of decision on the federal judiciary. The trier of fact may reach any result that the evidence warrants. See Belgard v. State of Hawaii, 1995 U.S. Dist. LEXIS 4903.

Defendants argue next that "by selecting free exercise claims for inclusion in a legislatively mandated compelling interest analysis, [Congress] itself created an equal protection problem, in that Congress did not choose other arguably equally deserving First Amendment conduct for this heightened scrutiny." If I understand defendants' argument, any attempt by Congress to enforce a limited subset of rights would violate the equal protection clause. Presumably this would include the Voting Rights Act itself which dealt with voting discrimination in a piecemeal fashion and was amended and supplemented many times. I reject defendants' argument. The equal protection clause protects against state-sponsored discrimination between persons not between constitutional rights or provisions of amendments. It would be a mistake to construe the clause as defendants suggest. Congress did not offend the equal protection clause by singling out only one right embodied in the First Amendment for added enforcement protection.

Finally although defendants have not raised the principle of federalism as a reason for holding the Religious Freedom Restoration Act unconstitutional the issue lurks in the background. Although Congress's power under § 5 was once considered plenary the Fourteenth Amendment may not be "applied in complete disregard for a State's constitutional powers." Gregory v. Ashcroft, 111 S. Ct. 2395 2405 (1991). However Congress's power under § 5 is

"not limited by the same Tenth Amendment constraints that circumscribe the exercise of its Commerce Clause powers." EEOC v. Wyoming, 460 U.S. at 243 n.18. The Fourteenth Amendment "necessarily limit[s]" the Eleventh Amendment and principles of federalism, Fitzpatrick v. Bitzer 427 U.S. 445 (1976), because the Civil War Amendments "were specifically designed as an expansion of federal power and an intrusion on state sovereignty." City of Rome v. United States, 446 U.S. at 179.

I conclude that the Religious Freedom Restoration Act does not violate the principle of federalism embodied in the Tenth and Eleventh Amendments. The primary areas in which principles of federalism may be found to limit Congress's power under § 5 are those within the core of traditional state prerogative, such as voter qualifications in state elections, see Oregon v. Mitchell, 400 U.S. at 207-09 (Harlan, J., dissenting), or qualifications for state judges, Ashcroft, 111 S. Ct. at 2400 (setting qualifications for state judges "goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity.") Although broad in scope, the Religious Freedom Restoration Act does not mandate judicial invasion into any core areas of traditional state prerogative. Even if its application implicated such concerns, however, states are provided under the act with a complete defense when their actions are narrowly tailored to further a compelling state interest. As the Court made clear in Ashcroft, laws enacted under § 5 will be interpreted not to invade core areas of state prerogative unless Congress clearly demonstrates such an intent. Id. at 2406. This rule of statutory construction assists in maintaining the proper balance between the federal and state sovereigns, while avoiding the need to declare a congressional enactment unconstitutional. See id. Under such a view, core areas of states' rights such as self governance should be viewed as compelling interests under the Religious Freedom Restoration Act. Seen this way, the Religious Freedom Restoration Act places only a reasonable

burden on state autonomy and does not transgress the minimal limits federalism places on Congress's § 5 authority.

E. Equal Protection

The equal protection clause of the Fourteenth Amendment guarantees that "all persons similarly situated should be treated alike." City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439 (1985). To prevail on an equal protection claim, a plaintiff must also show that respondents acted with a discriminatory purpose or intent. Minority Police Officers Ass'n v. South Bend, 801 F.2d 964, 966 (7th Cir. 1986). Unless an equal protection claim involves a suspect class or a fundamental right, courts are to apply the rational basis test. Under this test, a court presumes that the state action is valid and confirms it if it is related rationally to a legitimate state interest. Pryor v. Brennan, 914 F.2d 921, 923 (7th Cir. 1990).

Defendants offer two reasons to dismiss plaintiffs' equal protection claim, neither of which is persuasive. First, they assert that only rational factors caused them to treat plaintiffs differently from the plaintiffs in Braun. According to defendants, "by the time Judge Krueger held the procedures should be promulgated as rules, the defendants had already addressed the plaintiffs' complaint and complied with the court's decision" and there was no reason to suspend application of the emergency rules against other inmates because no judge had declared them invalid. However, defendants' theory hinges on whether their motivation was rational, a question of fact not properly decided on a motion to dismiss. Second, defendants argue that no other inmate was similarly situated to the Braun plaintiffs because the Braun plaintiffs were the only inmates litigating the claims. Again their arguments rest on attempts to clarify the time periods in which the various rules and procedures were in

place and to fill in details about whether for how long and to what degree there was differential treatment. These efforts depend on factual matters outside plaintiffs' complaint that are not properly before the court on a motion to dismiss.

There is another consideration not raised by defendants that warrants dismissal of plaintiffs' equal protection claims. In their response to defendants' qualified immunity arguments discussed below plaintiffs have announced that they seek only injunctive and declaratory relief. Yet their equal protection claims are premised entirely on allegations of past treatment. It appears from plaintiffs' amended complaint that once the permanent rules went into effect all inmates were treated equally. "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing present adverse effects." O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974). Plaintiffs have alleged no continuing present adverse effects of the differential treatment or "real and immediate threat of repeated injury." In the absence of such allegations this court is without jurisdiction to entertain the plaintiffs' equal protection class claims and they must be dismissed.

E. Qualified Immunity

The doctrine of qualified immunity protects defendants sued in their individual capacity from liability for monetary damages when the defendant has not violated clearly established law. The Eleventh Amendment acts as a jurisdictional bar to suits brought against the state either directly or through its agents and immunizes the state from monetary liability for damages. It does not protect state officials from suits requesting only equitable relief including injunctive and equitable monetary relief. Kentucky v. Graham, 473 U.S. 159, 169 n.18 (1984).

Defendants argue they are protected by the doctrine of qualified immunity from any request for monetary relief because the claims raised by plaintiffs involve unsettled areas of the law. Plaintiffs respond that defendants' fears of traditional money damages are misplaced because plaintiffs seek only declaratory injunctive and equitable monetary relief. Although I am not confident that plaintiffs' request for equitable monetary relief is viable, see Edelman v. Jordan, 415 U.S. 652, 667-69 (1973), I will take plaintiffs at their word and construe their amended complaint as containing no request for nonequitable money damages. I will dismiss plaintiffs' claims against defendants in their nonofficial capacities for failure to request any applicable relief. This makes it unnecessary to reach defendants' qualified immunity arguments.

F. Sovereign Immunity

Under the Eleventh Amendment, an unconsenting state is immune from suit by individual citizens. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 100 (1983). The amendment bars federal law suits that name the state or one of its departments or agencies as the defendant. Id.; Alabama v. Pugh, 438 U.S. 781 (1978). This is true regardless of the type or relief sought by the plaintiff. Pennhurst, 465 U.S. at 100 (citing Missouri v. Fiske, 290 U.S. 18, 27 (1933)). Because this court lacks jurisdiction over claims brought directly against the State of Wisconsin and because the Wisconsin Department of Corrections is a state entity, this defendant will be dismissed on the court's own motion.

ORDER

IT IS ORDERED that defendants' motion to dismiss is GRANTED with respect to plaintiffs' claim that the challenged regulations deprive them of their right of access to the courts, and plaintiffs' claims that they were denied equal protection. In all other respects, defendants' motion

to dismiss is DENIED. On the court's own motion, defendant Department of Corrections is dismissed from the law suit on the ground of Eleventh Amendment immunity. A status conference will be held on July 19, 1995, at 8:30 a.m., to discuss further scheduling in this case. The trial date of July 17, 1995 is continued indefinitely.

Entered this 23d day of June, 1995.

BY THE COURT:

/s/ Barbara B. Crabb
BARBARA B. CRABB
District Judge

CHAPTER 21B
RELIGIOUS FREEDOM RESTORATION

§ 2000bb. Congressional findings and declaration of purposes

(a) Findings

The Congress finds that--

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 871 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are--

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

(Pub. L. 103-141, § 2, Nov. 16, 1993, 107 Stat. 1488.)

* * *

§ 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if he burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

(Pub. L. 103-141, § 3, Nov. 16, 1993, 107 Stat. 1488)

* * *

§ 2000bb-2. Definitions

As used in this chapter--

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;

(2) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means the exercise of religion under the First Amendment to the Constitution.

(Pub. L. 103-141, § 5, Nov. 16, 1993, 107 Stat. 1489.)

* * *

§ 2000bb-3. Applicability

(a) In general

This chapter applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993 is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

(Pub. L. 103-141, § 6, Nov. 16, 1993, 107 Stat. 1489.)

* * *

§ 2000bb-4. Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, to exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

(Pub. L. 103-141, § 7, Nov. 16, 1993, 107 Stat. 1489.)

INTERNAL MANAGEMENT PROCEDURES

PROCEDURE NUMBER: DOC 309, I.M.P. #1-D
ORIGINAL EFFECTIVE DATE: 12-1-77
NEW EFFECTIVE DATE: 6-1-92
SUPERSEDES NUMBER: HSS 309, I.M.P. #1-D
DATED 5-1-89
CROSS REFERENCE:
ADMINISTRATIVE RULE: 309.35
OTHER:
ACA: 3-4280; 3-4281

State of Wisconsin

Department of Corrections
Division of Adult Institutions

SUBJECT: JEWELRY

Inmates shall be allowed to wear specific items of jewelry as stipulated below. Inmates choosing to wear such items of jewelry must sign a Property Receipt/Disposition Form (DOC-237).

A. Rings

Only married or widowed inmates shall be allowed to wear personal wedding rings only.

In addition to plain wedding bands, inmates shall be permitted to wear personal wedding rings that contain stones or have other features not usually associated with the traditional plan wedding band.

For safety and security purposes, such rings must have the stone or gem imbedded or recessed into

the surface of the ring. The ring band, excluding the setting, shall not at its thickest part exceed 1/8". The setting or object held by it shall not extend more than 1/16" beyond the adjacent surface of the band. The total thickness of the band, setting, and object mounted thereon shall not exceed 3/16" and the total width of the band shall not exceed 3/8".

Exception:

The only exception to the above will be for married or widowed female inmates who have a wedding set consisting of an engagement and wedding ring; this shall be considered as one ring.

B. Watches

A limit of one (1) watch per inmate with time and date functions only shall be allowed. Double stitched watchbands are not permitted. Watchbands with a single thickness of beads are allowed. The cost of a watch may not exceed $75.00. The inmate must further a receipt from the merchandise supplier.

No pocketwatch chains or cords are allowed.

C. Earrings, rings or other small ornaments (i.e., nose rings, nipple rings, etc.) that are affixed to holes pierced in the skin are not permitted.

D. Medical Alert Medallion or Bracelet

Will be allowed only if determined by the Medical Department that such "medical alert" information must be worn at all times.

The external boundary of a medallion may be no larger than a 50 cent piece; not to be hollow or of the locket-type; maximum thickness of 1/8", maximum weight of 2 oz.

The chain or other instrument used to attach the medallion around the neck shall not exceed 30" in total single strand length when measured from end to end; shall not exceed 1/8" in total diameter; links shall be no larger than 1/4" in length.

E. All jewelry items which because of shape or configuration are apt to cause a laceration if applied to the skin with force shall not be allowed.

(3)

FILED
JAN 6 1997
CLERK

No. 96-710

In the Supreme Court of the United States

OCTOBER TERM, 1996

MICHAEL J. SULLIVAN, ET AL., PETITIONERS

v.

SYLVESTER SASNETT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
MICHAEL JAY SINGER
LOWELL V. STURGILL JR.
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*, is a constitutional exercise of Congress's legislative authority under Section 5 of the Fourteenth Amendment.

2. Whether the Religious Freedom Restoration Act of 1993 is consistent with constitutional separation of powers principles.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 91 F.3d 1018. The opinions of the district court (Pet. App. A15-A58, A59-A90) are reported at 908 F. Supp. 1429 and 891 F. Supp. 1305.

JURISDICTION

The decision of the court of appeals was entered on August 2, 1996. The petition for a writ of certiorari was filed on October 29, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondents, who are inmates in the Wisconsin prison system, filed this suit in state court against

Wisconsin prison officials pursuant to the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, and 42 U.S.C. 1983. Pet. App. A15. Respondents allege that two prison procedures violate their rights to religious freedom. One of them, Internal Management Procedure (IMP) DOC 309 #1-D, forbids inmates to wear earrings, necklaces, bracelets, ankle bracelets and pins, including religious jewelry such as crucifixes. The second, DOC 309 IMP #4, prohibits inmates from possessing more than 25 books, magazines, newspapers or periodicals, including religious publications. Pet. App. A23. Respondents contended that these rules substantially burden their free exercise of religion by preventing them from wearing a cross and from owning the number of religious publications they need to pursue their faith.

After petitioners removed this suit to federal court, they moved to dismiss respondents' RFRA claim on the ground that RFRA is unconstitutional. The United States intervened to defend RFRA's constitutionality, and the district court issued a ruling upholding RFRA's constitutionality. Pet. App. A59-A90. The parties then conducted discovery and filed cross-motions for summary judgment. The court granted summary judgment for respondents on their RFRA claim challenging the religious jewelry prohibition. *Id.* at A57. The district court granted summary judgment for petitioners, however, with respect to the rule limiting to 25 the number of publications inmates can possess in their cells. *Ibid.*

Petitioners appealed the grant of summary judgment on the jewelry regulation, and the United States Court of Appeals for the Seventh Circuit affirmed. It held that RFRA is a valid exercise of

Congress's power under Section 5 of the Fourteenth Amendment (Pet. App. A7) and that RFRA does not violate separation of powers or the Establishment Clause (*id.* at A8). The Seventh Circuit also held that the jewelry regulation substantially burdens respondents' religiously motivated need to wear religious jewelry (*id.* at A9) and that petitioners did not prove that the jewelry regulation is the "least restrictive means" to achieve their compelling interests in prison safety and security (*id.* at A3, A9).[1]

ARGUMENT

This Court has granted certiorari to consider the constitutionality of the Religious Freedom Restoration Act of 1993 (RFRA) in *City of Boerne* v. *Flores*, No. 95-2074. Two of the questions presented in *Flores*—whether RFRA is a valid exercise of Congress's power under the Fourteenth Amendment and whether RFRA violates the separation of powers doctrine—are also presented in this case. *Flores* presents as well two other questions—regarding the constitutionality of RFRA under the Tenth Amendment and the Establishment Clause—that petitioners do not present in this case. See Pet. 4 n.1. The Court's decision in *Flores* is thus likely to resolve the issues in this case. Therefore, this case should be

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[1] At the Seventh Circuit's direction, the parties filed supplemental briefs discussing the possible bearing on the case of the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §101(a), Tit. VIII, 110 Stat. 1321-66 (to be codified at 18 U.S.C. 3626). The parties agreed, and the Seventh Circuit decided, that any questions about the impact of this new law on the case should be addressed in the first instance by the district court on a motion to modify the injunction. Pet. App. A10.

held and disposed of as appropriate in light of the Court's decision in *Flores*.

CONCLUSION

The petition in this case should be held pending the Court's decision in *City of Boerne* v. *Flores*, No. 95-2074, and then disposed of as appropriate in light of the Court's decision in that case.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
MICHAEL JAY SINGER
LOWELL V. STURGILL JR.
Attorneys

JANUARY 1997

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and

UNITED STATES OF AMERICA,

Intervenor-Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

*PERCY L. JULIAN, JR.
**Counsel of Record*
STEVEN N. SCHULMAN
JULIAN & ASSOCIATES, S. C.
Post Office Box 2206
Madison, Wisconsin 53701-2206
(608) 255-6400

ATTORNEYS FOR RESPONDENTS

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---

*PERCY L. JULIAN, JR.
**Counsel of Record*
STEVEN N. SCHULMAN
JULIAN & ASSOCIATES, S. C.
Post Office Box 2206
Madison, Wisconsin 53701-2206
(608) 255-6400

ATTORNEYS FOR RESPONDENTS

QUESTION PRESENTED

Whether the Religious Freedom Restoration Act, 42 U.S.C. §§2000bb et seq., is a facially valid exercise of Congress' power under Section 5 of the Fourteenth Amendment which also does not violate the Separation of Powers Doctrine.

LIST OF PARTIES

In addition to the Petitioners, the captioned Defendants-Appellants to the proceedings below included Petitioners' "agents, assistants, officials, employees, successors and others acting in concert or cooperation with them."

In addition to the Respondents, the captioned Plaintiffs-Appellees to the proceedings below included Respondents "individually and on behalf of all others similarly situated." However, the action does not come before the Court as a certified class action.

Original Plaintiffs Will Highfill and John Casteel did not have claims under the Religious Freedom Restoration Act of 1993 and are not parties before this Court.

Each of the continuing named Respondents join this brief in opposition to the petition.

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Other Authorities Cited

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The War Against the Jews, 1933-1945 (1975) 33

No. 96-710

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

MICHAEL SULLIVAN, et al.,

Petitioners,

v.

SYLVESTER SASNETT, et al.,

Respondents,

and

UNITED STATES OF AMERICA,

Intervenor-Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Sylvester Sasnett, Lonnie Smith, James Lowery, James Hadley and Barbara Miller respectfully request that the Court deny the Petition for Writ of Certiorari in the above-captioned matter.

OPINIONS BELOW

Petitioners' statement on the "Opinions Below" is complete and correct. However, the transcription of the Court of Appeals' decision in Petitioners' Appendix contains errors which are corrected in Respondents' Appendix. Resp. App. at A1-A2.[1]

JURISDICTION

The Judgment in Respondents' favor by the United States Court of Appeals for the Seventh Circuit is dated August 2, 1996. This Court's jurisdiction in this matter is discretionary under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const., Amend. I and Amend. XIV, §§1, 5, are reprinted in Resp. App. at A3. Wis. Const., Art. I, §18, is reprinted in Resp. App. at A3. The Religious Freedom Restoration Act of 1993, 42 U.S.C. §§2000bb et seq., is reprinted in Pet. App. at A91-A95.

STATEMENT OF THE CASE

In the proceedings below, the Court of Appeals upheld the District Court's injunction against Petitioners' correctional policy which barred inmate Respondents from possessing and wearing modest crosses and crucifixes for sincere religious devotional purposes. Petitioners now seek to vacate that injunction by having this Court declare unconstitutional

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[1]Citations to Petitioners' Appendix are abbreviated "Pet. App." while references to Respondents' Appendix are "Resp. App."

on its face, an Act of Congress, the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§2000bb et seq.

Petitioners are officials and policy makers of the Wisconsin Department of Corrections (DOC). Effective June 1, 1992, the DOC's Division of Adult Institutions issued the Internal Management Procedure (IMP) which is the subject underlying this case. Pet. App. at A96-A98. Petitioners' IMPs are written policies but not promulgated rules. The IMP here banned the wearing and possession of nearly all jewelry.[2] Religious emblems were deliberately included in the ban. Pet. at 2; Pet. App. at A20-A21. Inmates already in the system were given a full year to comply with the IMP. Pet. App. at A23. An inmate's failure to comply with the ban could result in discipline. Pet. App. at A18.

Respondents Sylvester Sasnett, Lonnie Smith and Barbara Miller, Christians of various views, were forced to give up a total of three crosses and a crucifix, which is a cross with a figure of Jesus on it. Pet. App. at A25-A28. The symbols were modestly designed, made of gold, valued from $32 to $75, and were all one to two inches long. Id.

It is undisputed that Sasnett, Smith and Miller wore their crosses as an important part of their religious prayers and devotion, motivated by their sincere Christian beliefs. Pet. App. at A25-A28. It is undisputed that Sasnett, Smith and Miller are not gang members, nor

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[2]The IMP contained significant exceptions. Inmates might possess a watch worth up to $75. Married or widowed inmates might also possess wedding rings of unlimited value, including those with stones, and married or widowed female inmates might, in addition, possess an engagement ring. Inmates were also allowed to wear medical alert bracelets or medallions, if required. Pet. App. at A96-A97. Possession of rosaries and some other religious articles were and are permitted by separate IMPs.

are they associated with gangs in any way. Id. It is undisputed that an inmate's participation in sincere religious practices and devotion is not only beneficial to the inmate but to the correctional system and society as a whole, as well. Pet. App. at A30-A31.

On December 20, 1993, Sylvester Sasnett commenced this action, pro se, in Wisconsin state court, challenging a number of Petitioners' property rules. Petitioners removed the matter to the United States District Court for the Western District of Wisconsin. The District Court, Judge Barbara B. Crabb, appointed counsel.

On August 1, 1994, Respondents filed an amended complaint adding several claims, plaintiffs and defendants. Sasnett, Smith and Miller alleged, inter alia, that their rights under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§2000bb et seq., were violated when Petitioners deemed contraband their Christian crosses. They also asserted constitutional claims challenging the jewelry ban under the First and Fourteenth Amendments.

Petitioners moved for partial dismissal of the complaint, arguing, inter alia, that RFRA was unconstitutional. The United States then joined as Plaintiff-Intervenor. On June 26, 1995, Judge Crabb denied the motion to dismiss the RFRA claim and ruled that the statute was constitutional. Sasnett v. Department of Corrections, 891 F.Supp. 1305, 1314-21 (W.D.Wis. 1995). Pet. App. at A75-A87.

Petitioners and Respondents then filed cross-motions for summary judgment on the RFRA issue, among others. By order docketed December 4, 1995, Judge Crabb, in pertinent

part, granted Respondents' motion and denied that of Petitioners. Sasnett v. Sullivan, 908 F.Supp. 1429 (W.D.Wis. 1995). Pet. App. at A15-A58. Judge Crabb ruled that Respondents Sasnett, Smith and Miller had shown beyond dispute that the jewelry ban violated RFRA. She enjoined Petitioners from enforcing the jewelry ban with respect to Respondents and any other inmates who could demonstrate sincere religious motivations for wearing jewelry. Pet. App. at A57. Contrary to Petitioners' assertion, Pet. at 3, Judge Crabb did not reach the collateral issues challenging the jewelry ban, including the First Amendment question.[3]

Petitioners appealed Judge Crabb's ruling to the United States Court of Appeals for the Seventh Circuit.[4] Specifically, they asserted that RFRA's compelling interest-least restrictive means test only applied when religiously mandated behavior was prohibited by government conduct, as opposed to the test based on sincere religious motivation which Judge Crabb had applied. They also argued that RFRA was unconstitutional. Petitioners did not assert that Judge Crabb erred in determining that the jewelry ban was not the least restrictive means of advancing a compelling state interest.

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[3]In addition to the cross ban question, the cross-motions for summary judgment also involved Respondents' claim that another of Petitioners' IMPs, limiting to 25 the number of publications of any kind that an inmate might possess, violated RFRA and the Constitution. Any reasonable reading of Judge Crabb's discussion of the First Amendment issue makes very clear that the District Court considered it only with respect to the publication limit and not with respect to the jewelry ban. Pet. App. at A54-A55. Judge Crabb did not address Respondents' First Amendment challenge to the cross ban because it was unnecessary, having already granted all of the relief Respondents had sought on statutory grounds.

[4]Judge Crabb denied Petitioners' motion for a stay pending the appeal on December 27, 1995. Dist. Ct. R. 168.

The Court of Appeals affirmed Judge Crabb's rulings in all respects on August 2, 1996. Sasnett v. Sullivan, 91 F.3d 1018 (7th Cir. 1996). Pet. App. at A1-A10. Writing for a unanimous court, Chief Judge Posner ruled that RFRA was constitutional,[5] that Judge Crabb had applied the proper test in addressing Respondents' RFRA claim and that Petitioners' IMP failed that test. Petitioners now seek review of the Seventh Circuit's decision by this Court only on the question of RFRA's constitutionality.[6]

REASONS FOR DENYING THE WRIT

Petitioners seek a writ of certiorari to attack the constitutionality of the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§2000bb et seq. The same issue has been accepted for review by this Court in City of Boerne v. Flores, 117 S.Ct. 293 (Oct. 15, 1996). However, the fact that the Court has agreed to hear Flores does not require it to take this case. The Court's determination to grant the writ remains discretionary and Petitioners are not relieved of the burden of establishing that there are "compelling" reasons to do so. Sup. Ct. R. 10. Here, there are important reasons for denying the petition.

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[5]Contrary to Petitioners' suggestion, Pet. at 7, Respondents did not repudiate the "ratchet theory" of Congress' power under U.S. Const., Amend XIV, §5.

[6]While the appeal was pending and in response to the District Court's injunction, Respondents issued a new IMP governing religious jewelry which became effective on May 15, 1996. The new IMP is set forth in Resp. App. at A6-A10. The new IMP permits inmates to possess a religious emblem up to 1-1/8 inches long and worth up to $10.00. Inmates may wear and display their emblem on necklaces in their cells, in designated areas and in the chapel. Inmates may also wear, but not display, the emblem while in transit within the institution. Requests for a religious symbol are directed to the warden, subject to security considerations and established rules concerning inmate purchases. Denial of requests must be explained in writing.

The case below was not about Congress' authority to enact RFRA; it was about an unreasonable and counter-productive correctional policy which was not lawful under any standards of scrutiny, including those established by the Free Exercise Clause of the First Amendment and the parallel provision of the Wisconsin Constitution. The sole effect served by the petition will be to protract this litigation and delay the inevitable demise of Petitioners' IMP. Petitioners make no arguments that are not already before the Court in Flores. Moreover, even if RFRA is unconstitutional, the ultimate outcome of this litigation is not likely to be affected by this Court's decision.

I. BACKGROUND OF RFRA AND APPLICATION IN THIS CASE.

The record below demonstrates the arbitrary unreasonableness of Petitioners' ban of selected religious symbols and underscores Respondents' argument that the ban is fatally flawed anyway under the Free Exercise Clause and under late-breaking Wisconsin case law interpreting that state's Freedom of Conscience provisions. The Court should not take the drastic step of striking down an Act of Congress in order to give Petitioners a second chance to resurrect their unsound policy.

In Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872, 878 (1990), this Court held that neutral laws of general applicability which incidentally burden the exercise of religion need not be justified by a compelling interest under the First Amendment's Free Exercise Clause. In response to Smith, Congress enacted the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§2000bb et seq. Pet. App. at A91-A95.

RFRA prohibits a government from imposing a substantial burden on a person's free exercise of religion, even through a generally applicable law, unless that government demonstrates that application of the burden to the person is the least restrictive means of furthering a compelling state interest. 42 U.S.C. §§2000bb-1(a), (b).[7]

Here, the District Court concluded and the Seventh Circuit agreed, that the appropriate test for determining the existence of a substantial burden on the exercise of religion was whether conduct or expression based on sincere religious motivation was significantly or meaningfully curtailed. Pet. App. at A43; Pet. App. at A8-A9. Applying that test, it was undisputed that religious symbols, including religious jewelry, played an important role in the practice of religion devotion. Pet. App. at A25-A28, A30. The crosses and crucifixes of Christians, such as Sasnett, Smith and Miller, were examples of such important religious symbols. Pet. App. at A30. These findings were consistent with this Court's long-standing recognition of the importance of religious symbols, including crosses, as a means of religious communication and practice. See, West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624, 632 (1943).

Petitioners' IMP obviously placed a substantial burden on this religious conduct. Respondents' were barred, under threat of disciplinary sanctions, from wearing, or even possessing, a Christian cross, no matter how unobtrusive and no matter how unconnected

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[7]It is undisputed that RFRA's compelling interest test applies to prisons. Jolly v. Coughlin, 76 F.3d. 468, 475 (2d Cir. 1996) (collecting cases). See, 139 Cong. Rec. S14468 (daily ed. Oct. 27, 1993) (Senate vote rejecting amendment to exclude RFRA from prisons).

with illicit gang activities. Pet. App. at A25-A28. Under the IMP, a Christian's cross was contraband in the prisons of Wisconsin.

In light of this substantial burden, it was up to Petitioners to show that the ban on religious jewelry, like crosses and crucifixes, was the least restrictive means of furthering a compelling state interest. They failed dismally to meet this burden.

Petitioners cannot claim that the courts below failed to recognize the serious and delicate nature of maintaining order and security in prisons. The courts below expressly affirmed that Petitioners had a compelling interest in maintaining prison security. Pet. App. at A9.

However, Petitioners' failed to establish that their jewelry ban was the least restrictive means of advancing this interest. Beyond that, the undisputed evidence established that the jewelry ban would have failed a test calling for far less scrutiny than RFRA requires. The jewelry ban was the most restrictive means of advancing any conceivable security interest. At the same time, the ban contained many inexplicable exceptions.

Petitioners asserted that the jewelry ban was necessary to curb the use of gang identification symbols and to reduce the presence of expensive items which would be used in bartering and strong-arming or fostering false claims of loss or theft. Pet. at 2. Petitioners did not try to justify the IMP as a ban on potential weapons but Respondents, and the courts below, addressed that issue anyway. Both courts below forcefully concluded that Petitioners had failed to identify any security concern which could not be adequately addressed by time,

place and manner restrictions rather than a complete ban on crosses, crucifixes and other religious emblems. Pet. App. at A9, A53-A54.

Petitioners have never argued that the problems they face in administering Wisconsin's prisons are any more serious than those confronting prison administrators throughout the land. Yet, Wisconsin's ban of religious jewelry is far more draconian than the policies of other prison systems. The United States Bureau of Prisons permits inmates to wear or use personal religious items, including medallions, "ordinarily" during services and, otherwise, with permission within the institution. 28 C.F.R. §548.16. Illinois permits the possession of religious symbols up to two inches long and worth up to $50. Ill. Adm. Code, Title 20, §425.90(c)(2). New York permits the wearing of religious jewelry and symbols underneath clothing, and a court has enjoined even that restriction to the extent it prohibits the use of a Muslim's dhkir beads during prayer. Alameen v. Coughlin, 892 F.Supp. 440, 442 n.1, 451 (E.D.N.Y. 1995). Texas permits the wearing of religious insignia in cells and at religious services. Muhammad v. Lynaugh, 966 F.2d 901, 903 (5th Cir. 1992).

Indeed, a former head of the Wisconsin correctional system, the very system Petitioners represent, testified emphatically that the jewelry ban was not a reasonable means of dealing with important prison security interests. He stated that:

> . . . I think you want to be careful in limiting religious activities, religious symbols, when there are so many benefits to them and their return in terms of control of illegal activity, is so slight, if there's any return at all.

Dep. of Prof. Walter J. Dickey, Dist. Ct. R. 85 at 66.

> [T]o say that it should be an across-the-board limitation of religious jewelry, just -- I mean, again, its too mindless. I mean, it's too rigid. It's too extreme.

Id., at 67-68.

Petitioners claimed that they could not tell the difference between jewelry worn as a symbol of religious devotion and jewelry worn to identify with a gang. Other courts have found that argument hard to accept, Alameen, 892 F.Supp. at 450-51; Campos v. Coughlin, 854 F.Supp. 194, 209 (S.D.N.Y. 1994), and the District Court and the Court of Appeals clearly rejected it.

Nothing in the record suggests that confusion between symbols worn for gang purposes and those worn for sincere religious reasons has occurred or would occur very often. Professor Dickey testified that competent prison officials could make satisfactory determinations of whether conduct is legitimately religious. Dist. Ct. R. 85 at 75-76. Such determinations, involving fact findings and assessments of credibility and sincerity, are subject only to the most deferential standard of judicial review.

Petitioners' assertion that they cannot identify symbols worn for sincere religious purposes defies credulity because their own rules expect and require them to make such judgments. Thus, Petitioners have issued nineteen pages of IMPs identifying permitted religious practices, rituals and devotional materials. Wis. DOC, IMP 6 et seq. Dist. Ct. R. 147. Catholics, for example, may possess a rosary, Wis. DOC, IMP 6-B, a particularly

interesting point to Judge Posner and an exception to the jewelry ban Petitioners were unable to explain away. Pet. App. at A9.

Petitioners' permit the possession and use of several other articles which demonstrate the arbitrariness of defining crosses as "jewelry."[8] Many of the permitted items serve the same role in prayer and devotion as the crosses and crucifixes used by Sasnett, Smith and Miller. Buddhists may have prayer beads. Wis. DOC, IMP 6-A. Jews may have phylacteries, small leather containers containing holy inscriptions and used in prayer. IMP 6-F. Muslims may have prayer beads. IMP 6-G. Native Americans may possess medicine bags. IMP 6-H. True, there are restrictions on the wearing and use of some of these items, but inmates may possess and engage in religious devotion with them. If Petitioners are competent to identify these items as legitimately used for religious purposes, there is no reason they cannot in most cases also identify other items used for sincere religious purposes, like the modest and relatively unadorned crosses and crucifixes used by Respondents.

Moreover, promulgated regulations require Petitioners to identify religiously motivated practices. Inmates may make requests to engage in religious practices which depart from institutional routines.

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[8]Promulgated regulations also permit the wearing of "required" religious medals. Wis. Adm. Code, §DOC 309.61(6). Resp. App. at A5. However, it appeared during the litigation that Petitioners regarded this as a doctrinal rather than a personal requirement, and, in any event, did not permit inmates to possess crosses whether their religious beliefs required so or not. Moreover, both the District Court, Pet. App. at A43, and the Court of Appeals in another case, Mack v. O'Leary, 80 F.3d 1175, 1179 (7th Cir. 1996), ruled that religious "requirements," as opposed to religious motivations, are not appropriate criteria for determining substantial burdens on religion.

> Upon receipt of the request, the superintendent, with the assistance of the Chaplin or designated staff person with appropriate religious training, shall determine if the request is motivated by religious beliefs.

Wis. Adm. Code §DOC 309.61(2)(b). Resp. App. at A4. This is a fully promulgated rule, not merely an IMP. Petitioners claim that they cannot identify jewelry worn for sincere religious purposes flies in the face of this rule and cannot withstand scrutiny of any sort.

Similarly, the jewelry ban is a poor means of protecting against theft, bartering and strong-arming. The same IMP which bans Respondents crosses and crucifixes, no matter how inexpensive, inexplicably permits inmates to have $75 watches and wedding rings of unlimited value. Pet. App. at A96-A97. Other property rules permit inmates to possess up to $350 worth of electronics and musical equipment. DOC 309, IMP #1, ¶7. Dist. Ct. R. 124. Other individual items may be worth up to $75. Id. However, inmates may not possess crosses no matter how inexpensive.

To deal with the threat of false claims, there is no reason why Petitioners cannot simply keep a written record of religious emblems which is precisely what their new IMP provides. Resp. App. at A8, A10. A written record of the religious symbols possessed by inmates is certainly an adequate means of insuring that inmates will not be able to get away with claiming they have lost what they never had.

In sum, Petitioners' ban of religious symbols just because they happen to be "jewelry" is purely gratuitous. This point was recognized emphatically by Judge Posner, writing for the unanimous panel of the Seventh Circuit.[9]

> The regulation to which the defendants refuse to make an exception forbids the wearing of a crucifix even if it is too small or light to be a weapon (at least more of a weapon than a fist, a tooth, or a fingernail), too inexpensive to barter for a weapon, invisible because worn under clothing, and not a gang symbol or easily confused with one. The state allows prisoners to have rosaries, which could be used to strangle a fellow prisoner or a guard, and bans crucifixes even in correctional facilities wholly occupied by white-collar prisoners who do not belong to gangs or get into fights with each other or the guards. These features of the state's practice blast the case for regarding a ban on crucifixes and other religious jewelry as a serious and measured response to a concern with violence or a concern with gangs, legitimate and important as these concerns are.

Pet. App. at A9 (emphasis added).

This Court is faced with a docket of thousands of cases. Many of them raise serious and important issues but the Court properly exercises its discretion not to hear them because demands of limited resources require that only a few of the most important be given the Court's attention. Petitioners come before this Court asserting that its policy banning religious jewelry, so thoroughly and vigorously repudiated by Judge Posner and the Court of Appeals, as well as by the District Court, is one of those chosen few cases worthy of this Court's review. Beyond that, Petitioners pray that this Court strike down as facially and completely invalid a duly enacted Act of Congress, "'the gravest and most delicate duty that

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[9]Judge Crabb thought Petitioners' claimed validity of the IMP had such little merit on appeal that she refused to grant Petitioners' motion to stay the injunction pending the appeal. Dist. Ct. R.168.

this Court is called upon to perform,'"[10] so that they might have a chance to re-litigate the lawfulness of that policy. This "mindless," "rigid" and "extreme"[11] ban on religious jewelry, which is not a "serious and measured response"[12] even to legitimate concerns of prison security should not be dignified with a place on the docket of this Court.

II. THE BAN ON RELIGIOUS JEWELRY VIOLATES THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

Even should this Court find RFRA unconstitutional and vacate the judgments of the courts below, the result will simply be further litigation which likely will reach the same outcome, the end of the ban on crosses and other religious symbols. As discussed above, at n. 3, and contrary to Petitioners' unjustified reading of Judge Crabb's decision, the District Court left open the question of whether Petitioners' jewelry ban violated the First Amendment's Free Exercise Clause. See Pet. App. at A54-A55. Should the matter ultimately be considered, Respondents, not Petitioners, will prevail.

The Religious Freedom Restoration Act does not purport to set the standard for analyzing claims under the Free Exercise Clause. Instead, in the prison setting, the test continues to be the reasonableness test of Turner v. Safley, 482 U.S. 78, 89 (1987), and O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987). See, Jolly v. Coughlin, 76 F.3d 468,

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[10] Fullilove v. Klutznick, 448 U.S. 448, 472 (1980) (Burger, C.J., opinion) (quoting Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., opinion)).

[11] Dep. of Prof. Walter J. Dickey, former Administrator, Wisconsin Div. of Corrections. Dist. Ct. R. 85 at 68.

[12] Judge Posner for the unanimous Court of Appeals below. Pet. App. at A9.

475 (2d Cir. 1996). In Turner, 482 U.S. at 89, a free speech case, and O'Lone, 482 U.S. at 349, a free exercise case, the Court held that prison regulations and policies alleged to infringe on First Amendment rights should be upheld if reasonably related to legitimate penal interests.

Turner and O'Lone decidedly do not give prison administrators carte blanche to impose groundless infringements on an inmate's religious rights. "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." Turner, 482 U.S. at 84. The regulation must be "'reasonably related'" to the penal interests and "'exaggerated responses'" even to legitimate concerns will not stand scrutiny. Turner, 482 U.S. at 87. The "regulation must have a logical connection to legitimate governmental interests invoked to justify it." O'Lone, 482 U.S. at 350 (emphasis added). Here, the policy that Judge Posner and the Seventh Circuit "blast[ed]" as failing to be a "serious and measured response to a concern with violence or a concern with gangs, legitimate and important as these concerns are . . .," Pet. App. at A9, is certainly an exaggerated response which lacks a logical connection to the concerns purportedly justifying it.[13]

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[13]Although compelling interest scrutiny is not available to Respondents under the First Amendment, we note that Petitioners' jewelry ban did not merely inflict an incidental burden on Respondents' religious observance. As the petition, at 2, indicates, religious jewelry, especially crosses, was deliberately included within the sweep of the ban. See, Pet. App. at A20-A21.

Williams v. Lane, 851 F.2d 867, 877 (7th Cir. 1988), cert. denied, 488 U.S. 1047 (1989), sets forth a concise summary of the factors addressed in considering the Turner-O'Lone standard. The Court must inquire into:

1. "whether a valid, rational connection exists between the regulation and a legitimate government interest behind the rule";

2. "whether there are alternative means of exercising the right in question that remain available to prisoners";

3. "the impact accommodation of the asserted constitutional right would have on guards and other inmates and the allocation of prison resources"; and

4. "although the regulation need not satisfy a least restrictive alternative test, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable."

With respect to the first Turner-O'Lone factor, certainly the Seventh Circuit's comments previously quoted, Pet. App. at A9, strongly suggest that it does not believe that the ban on crosses and crucifixes, and other religious symbols had a "valid, rational connection" with any legitimate governmental interests. Professor Dickey, former head of Petitioners' correctional system, said as much. Dist. Ct. R. 85 at 66, 67-68. Even crosses, crucifixes and other religious symbols obviously used for religious purposes and harmlessly made and modestly priced were contraband.

Yet, the ban contained odd exceptions. Inmates could possess rosaries, Muslim and Buddhist prayer beads, Jewish phylacteries and Native American medicine bags. Wis. DOC IMP ##6 et seq., Dist. Ct. R. 147. Any of these can be used as a weapon, as Judge Posner

noted with respect to rosaries. Pet. App. at A9. Prisons elsewhere have tried to restrict the display of prayer beads because of their potential as gang symbols, Campos v. Coughlin, 854 F.Supp. 194 (S.D.N.Y. 1994), but Petitioners do not regard the possession, at least, of these items as troublesome. Prisons have tried to restrict the possession of medicine bags because of their potential for use in drug smuggling, Werner v. McCotter, 49 F.3d 1476, 1481 (10th Cir. 1995), but possessing, if not wearing, these does not bother Petitioners.

However, under Petitioners' ban, Christians could not wear and, other than the Catholic's rosary, could not even possess, the symbol of the cross or a crucifix, no matter how unobtrusive and no matter how unconnected with gang activity. Under the ban, inmates could wear expensive wedding rings or $75 watches but not $10 crosses. There is no rational basis relating to the risk of property crimes, for this distinction. Christian inmates could not wear crosses if their weapons potential was no greater than that of a charm. The Free Exercise Clause cannot be so devoid of meaning, even in the prison context, as to sustain Petitioners' arbitrary and capricious judgment as to what its jewelry ban permitted or forbade.

Turning to the second Turner-O'Lone factor, there is no adequate alternative to Respondents' possession of their crosses and crucifixes. Sasnett, Smith and Miller presented uncontroverted evidence that the cross was a centerpiece of their prayer and devotion. Pet. App. at A25-A28. The importance of the cross in the Christian faith is obvious and has been recognized by this Court. West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624, 632 (1943). Petitioners know this because they permit the possession of rosaries. Petitioners also

recognize the importance of the devotional objects of other religions, such as the ones discussed above, which serve a purpose similar to Respondents' crosses. While O'Lone certainly permits restrictions on these items, it does not permit a gratuitous total ban based on Petitioners' exaggerated claims and arbitrary distinctions.

The third Turner-O'Lone factor requires inquiry into the impact of permitting the items on guards, other inmates and prison resources. As discussed in the previous section, prison administrators in other jurisdictions have had no problems permitting religious symbols. Petitioners themselves have no problems with the possession of rosaries, prayer beads and medicine bags. Petitioners may place appropriate restrictions on possessing religious symbols. A complete ban is not appropriate.

With respect to the treatment of other inmates, it is Respondents who have been treated unequally. There is no legitimate penal interest, for example, in permitting inmates to possess prayer beads but not crosses. As for non-religious inmates who may wish to possess crosses or crucifixes, they will not suffer the spiritual damage that the ban inflicted on religious inmates.

The fourth Turner-O'Lone factor requires the examination of alternatives. Once again, we call attention to the policies of other jurisdictions discussed in the previous section which permit the right to possess religious symbols. Professor Dickey suggested size, material, value, and manner of affixing restrictions. Dist. Ct. R. 85 at 68-69. Petitioners selected the worst possible alternative, a total ban.

Finally, it is important to note the important benefits religion imparts not only on the inmate but on the orderly running of the institutions and rehabilitation interests, as well. These are a matter of undisputed fact, Pet. App. at A30-A31, and are recognized in Petitioners' own rules. Wis. Adm. Code §309.61(1)(a). Resp. App. at A4. This makes more puzzling Petitioners' failure to recognize, as Professor Dickey noted, that their ban on religious jewelry does more harm than good. Dist. R. 85 at 66. The best way to curb gang activities is to promote alternatives such as religious activities.[14]

III. PETITIONERS' BAN ON RELIGIOUS JEWELRY VIOLATES THE WISCONSIN CONSTITUTION.

On June 19, 1996, while the appeal in this case was pending, the Supreme Court of Wisconsin held that Wisconsin's Freedom of Conscience Clause, Wis. Const., Art. I, §18, Resp. App. at A3, requires compelling interest-least restrictive means scrutiny for substantial burdens imposed on the exercise of religion by generally applicable laws. State v. Miller, 202 Wis.2d 56, 66-69, 549 N.W.2d 235, 239-41 (1996). In doing so, the Wisconsin court expressly declined to follow the path taken by this Court in Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872 (1990).

Miller represents an important new development in Wisconsin constitutional law. In the earlier review of the same case, the Wisconsin Court of Appeals, had ruled that

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[14]Even if the record is insufficient to establish that we are entitled to summary judgment on the First Amendment claim, it is certainly sufficient to deny summary judgment to Petitioners. Professor Dickey, who was a predecessor of Petitioner Sullivan as head of the Wisconsin correctional system, deposed that Petitioners' jewelry ban was "too mindless," "too rigid" and "too extreme." Dist. Ct. R. 85 at 68. Thus, there are no circumstances under which a remand can result automatically in an entry of judgment for Petitioners.

Wisconsin's Freedom of Conscience Clause must be interpreted in light of this Court's cases interpreting the Free Exercise Clause. State v. Miller, 196 Wis.2d 238, 245, 538 N.W.2d 573, 576 (Ct. App. 1995). Wisconsin appellate courts had so ruled on numerous occasions. See, e.g., Jocz v. LIRC, 196 Wis.2d 273, 297-98 and n.12, 538 N.W.2d 588, 595-96 (Ct. App. 1995); In re Marriage of Lange v. Lange, 175 Wis.2d 373, 383-84, 502 N.W.2d 143, 147-48 (Ct. App. 1993) (following Smith), rev. denied, 505 N.W.2d 137 (Wis. 1993), cert. denied, 114. S.Ct. 1416 (1994).

Nothing in the Wisconsin Supreme Court's decision in Miller suggests that inmate cases require a different level of scrutiny. This is significant because no published Wisconsin appellate decision, as far as we are aware, has considered whether Wisconsin's Constitution requires the Turner-O'Lone reasonableness test in the prison setting.[15] Thus, it must be presumed that, just as Congress intended RFRA to protect inmates, the Wisconsin Supreme Court intends the compelling interest-least restrictive means test to apply across the board.

Because Wisconsin now requires compelling interest-least restrictive means scrutiny for burdens on the exercise of religion under its own constitution, an independent state ground now exists for the judgment in this case. Having failed RFRA's compelling interest-

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[15]Wisconsin courts have followed Turner and O'Lone in interpreting the United States Constitution. See, e.g., Yoder v. Palmeri, 177 Wis.2d 756, 760-61, 502 N.W.2d 903, 905-06 (Ct. App. 1993); Casteel v. McCaughtry, 168 Wis.2d 758, 766, 484 N.W.2d 579, 582 (Ct. App. 1992), mod. on other grounds, 176 Wis. 2d 571, cert. denied, 114 S.Ct. 327 (1993).

least restrictive means test, it is inconceivable that Petitioners would prevail under the same test applied as a matter of Wisconsin constitutional law.[16]

IV. THE ONLY EFFECT OF GRANTING THE WRIT WILL BE TO PROTRACT THIS LITIGATION AND CAUSE UNCERTAINTY IN THE OPERATION OF THE WISCONSIN CORRECTIONAL SYSTEM.

The only issue presented in the Petition, RFRA's constitutionality, is already before the Court in Flores. Petitioners raise no additional arguments and offer no new insight to inform the Court's disposition of the issue. Indeed, Petitioners' arguments for striking down RFRA are expressly based on the analysis of counsel for the Flores petitioner. Pet. at 4 n. 2. Petitioners, Pet. at 4, 14, make very clear that they do not want this case to be briefed or heard. Instead, they want "tag-along" relief should the Flores petitioner prevail. In short, the Petition is no more "a serious and measured response," Pet. App. at A9, than the ban on religious symbols itself. Petitioners are simply using this Court as a forum for private and summary relief.[17] Their failure to appreciate the gravity of this Court's task is itself grounds for denying the writ.

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[16]The Amended Complaint does not allege that the ban on religious emblems violates the Wisconsin Constitution. However, we are not asking the Court to affirm the decisions below on this ground. We are merely asking the Court to exercise its discretion and deny the writ. If this case is remanded, the District Court is unlikely to deny a motion to amend the complaint under Fed.R.Civ.Pr. 15(a), which permits amendments "freely given when justice so requires." As discussed, the Wisconsin Supreme Court's decision is a substantial change in the law of that state which was not issued until the appeal was already pending in this case. The record already exists to determine the issue on Wisconsin constitutional grounds. Petitioners will not be prejudiced by an amendment to the complaint because any other inmate desiring to wear a cross or other religious symbol will ultimately obtain the same relief.

[17]Petitioners are also seeking a back-door means of avoiding the attorneys' fees awarded in this case.

If the Court is inclined to rule RFRA unconstitutional, denying the writ will have no effect on the precedential value of the decisions of the courts below. The Court has repeatedly advised that "'denial of a writ of certiorari imports no expression of opinion upon the merits of the case.'" Teague v. Lane, 489 U.S. 288, 296 (1989) (citation omitted). If the Court ultimately determines that RFRA is unconstitutional, then the opinions below have no value as precedent (on the constitutional issue at any rate) whether or not the writ is granted in this case. Conversely, if RFRA is upheld, the opinions of the Courts below will carry the same weight regardless of whether or not the writ is granted.

Denying the writ will not deprive Petitioners of relief, if they are entitled to it, even if the Court strikes down RFRA. As the Court of Appeals made plain, the recently enacted Prison Litigation Reform Act of 1996, Pub. L. 104-134, Title VIII (18 U.S.C. §3626), permits Petitioners "to ask the district court to modify an injunction in light of changed circumstances, including a change in the applicable law." Pet. App. at A10.

However, granting the writ will cause substantial uncertainty in the operation of the Wisconsin correctional system. Due to the injunction, since May 15, 1996, Wisconsin has permitted inmates to acquire religious emblems. Above at n.6; Resp. App. at A6-A10. If RFRA is ultimately upheld then the presence of this case on the Court's docket will have achieved nothing but needless uncertainty about the status of that new policy.

Even, if RFRA is ultimately struck down, the old jewelry rule would not be restored automatically. The District Court will have to address the other issues discussed in the

previous two sections. Even if we do not prevail, Petitioners would then have to cancel the new policy and order inmates to dispose of any emblems they have already acquired. In short, even if RFRA is unconstitutional, granting the writ in this case will open up a Pandora's Box of uncertainty and perhaps further litigation involving other inmates challenging the ban under the Wisconsin Constitution in state court.

Moreover, by the time the Court decides this case on the merits, the new rule will have been in effect for almost, perhaps more than, a year. Petitioners might decide that the new policy is workable and satisfies both institutional and inmate needs.[18] In that circumstance, this Court's decision on the merits will only have the practical effect of an advisory opinion. By contrast, again, if the writ is denied, Petitioners can always seek relief under the Prison Litigation Reform Act if the new rule is unworkable and RFRA is unconstitutional.

In sum, granting the writ and deciding this case on the merits will have no effect on the underlying relief, one way or the other.

V. RFRA IS CONSTITUTIONAL

Respondents argue that RFRA exceeds the powers granted Congress by U.S. Const., Amend XIV, §5 and violates Separation of Powers principles. Judge Posner, writing for the Court of Appeals below, rejected these arguments. Sasnett v. Sullivan, 91 F.3d 1018, 1019-22 (7th Cir. 1996) (Pet. App. at A3-A8; Resp. App. at A1-A2). The Fifth Circuit had previously declared RFRA constitutional in a unanimous panel decision written by Judge

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[18]The new IMP is not without its own shortcomings, but that is not a subject before this Court.

Higginbotham. Flores v. City of Boerne, 73 F.3d 1352, 1356-65 (5th Cir), reh'g en banc denied, 83 F.3d 421 (5th Cir. 1996), cert. granted, 117 S.Ct. 293 (Oct. 15, 1996). Judge Buckley and another unanimous appellate panel has also held RFRA constitutional, addressing Establishment Clause and Separation of Powers issues. E.E.O.C. v. Catholic Univ., 83 F.3d 455, 469-70 (D.C. Cir. 1996).[19] In Sasnett, the Seventh Circuit sustained RFRA because it gave otherwise disadvantaged persons a meaningful right to exercise their religion. Resp. App. at A1-A2. The Court drew not only on underlying Free Exercise Clause principles but equal protection principles as well.

A "strong presumptive validity" accompanies Acts of Congress. United States v. National Dairy Products Corp., 372 U.S. 29, 32 (1963). This presumption is a "steely realism and not merely a protocol of manners or an empty formalism." Flores, 73 F.3d at 1356.

U.S. Const., Amend. XIV, §1 forbids states from depriving persons of liberty without due process and denying persons the equal protection of the laws. The due process protection incorporates First Amendment rights. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). Section 5 provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." In its sphere, the Fourteenth Amendment represents a grant of plenary authority to Congress and a corresponding diminution of the power of the states. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

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[19]Although some judges have opined that RFRA is unconstitutional in isolated district court opinions and appellate dissents, no appellate court, state or federal, has found RFRA to be unconstitutional and nearly all of the lower courts have also upheld it.

Under any view, Congress' power under §5 is broad. Congress may enact any appropriate legislation, not otherwise prohibited, aimed at carrying out the proscriptions of the Fourteenth Amendment and in order "'. . . to secure to all persons the enjoyment of perfect equality of civil rights. . . ." Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) (quoting Ex parte Virginia, 100 U.S. 339, 345-46 (1880)).

Morgan, which commanded a 7-2 majority, remains the leading case for analyzing Congress' authority under §5. There, the Court upheld a Voting Rights Act provision which prohibited a state's administration of literacy tests to those who had been educated in non-English schools in Puerto Rico. A previous case, Lassiter v. Northampton County Bd of Election, 360 U.S. 45 (1959), had sustained such literacy tests under the Fourteenth and Fifteenth Amendments.

The Court in Morgan offered two separate rationales. Under the "substantive" theory, Congress could conclude, through its own fact-finding, that the literacy test itself violated the Equal Protection Clause, Lassiter notwithstanding. Morgan, 384 U.S. at 653-56. Petitioners do not dispute that RFRA is constitutional should the "substantive" theory still have vitality.[20] Pet. at 7 - 8. Petitioners want to pigeonhole RFRA as sustainable only under this theory and then have the Court rule that the theory itself is no longer law.

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[20]We reserve the right to brief the question of the "substantive" theory's continued vitality should the Court grant the petition.

However, Petitioners drastically understate Congress' authority under Morgan's "remedial" theory. Petitioners suggest that Congress may prohibit only unconstitutional conduct and such constitutional conduct that might be hard to distinguish from it. However, the Court in Morgan held that Congress could prohibit the literacy test because Congress could conclude that such tests had "[t]he practical effect" of denying members of the Puerto Rican community the right to vote which, in turn, was necessary for it to fight discrimination in obtaining equal treatment in other areas. 384 U.S. at 652-53. Thus, as Judge Posner noted Morgan's remedial theory is really an "empowerment" theory. Sasnett, 91 F.3d at 1022. Resp. App. at A1-A2. Congress may remedy discriminatory effects, not merely as incidental to rectifying the evil of discriminatory intent, but because Congress may conclude that discriminatory effects are evil in their own right. Congress may do so, not as a matter of redefining constitutional rights, but as a means of creating statutory remedies which reduce discriminatory "treatment" in the community at large by making those rights recognized in the Constitution, the right to vote in Morgan, more meaningful and effective. 384 U.S. at 652. RFRA does precisely this, taking a recognized right, to the free exercise of religion, and making it more effective by reducing substantial burdens, thereby enhancing the ability of religious adherents to become equal participants in the activities of the community at large.

The Court has continued to recognize the "empowerment" theory. "The power to 'enforce' may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations."

City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989) (O'Connor, J., opinion) (emphasis in original). Thus, in Oregon v. Mitchell, 400 U.S. 112, 118 (1970), an otherwise divided Court followed Morgan by unanimously sustaining, albeit on differing grounds, a nationwide ban on literacy tests, even in places that had no demonstrated history of discrimination. Mitchell, 400 U.S. at 118, 132-34, 144-47, 216-17, 231-36, 282-84 (five opinions, nine justices).

The Court has established that while the Fourteenth and Fifteenth Amendments themselves prohibit only purposeful racial discrimination, Washington v. Davis, 426 U.S. 229, 239 (1976) (14th Amend.); City of Mobile v. Bolden, 446 U.S. 55, 65 (1980) (Stewart, J., plurality) (15th Amend.), Congress' powers to enforce those provisions permit it to prohibit state activities which have a discriminatory effect as well. Fullilove v. Klutznick, 448 U.S. 448, 477 (1980) (Burger, C.J., opinion) (14th Amend.); City of Rome v. United States, 446 U.S. 156, 173 (1980) (15th Amend.). The Court has recognized that purposeful discrimination becomes ingrained in society so that its effect lingers on long after the intent may be rooted out. City of Rome, 446 U.S. at 175-77. Thus, "congressional authority extends beyond the prohibition of purposeful discrimination to encompass state action that has discriminatory impact perpetuating the effects of past discrimination." Fullilove, 448 U.S. at 477 (emphasis added). Commenting on these cases, Judge Higginbotham noted "[d]ispensing with the constitutionally rooted requirement that discrimination be purposeful is an extraordinary exercise of power." Flores, 73 F.3d at 1361-62.

Congress' §5 power is broad in other respects as well. In Fitzpatrick v. Bitzer, 427 U.S. 445, 456-57 (1976), the Court held that U.S. Const., Amend. XIV, §5 limited a state's Eleventh Amendment immunity, thus permitting Title VII claims which drew from the state's treasury. In so ruling, the Court sustained Congress' authority to intervene in states' management of their own employees in order to root out discriminatory conduct.

However prescient the dissent in E.E.O.C. v. Wyoming, 460 U.S. 226, 259-64 (1983) (Burger, C.J.), may or may not be on the continued vitality of Morgan's "substantive" theory, it does not suggest a diminution of Congress' authority to root out discriminatory effects. In Wyoming, 460 U.S. at 262, the dissenters opposed the notion that Congress, under §5, could define rights independently of the Court.[21]

RFRA does not so define new rights out of whole cloth. In Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 113 S.Ct. 2217 (1993), the Court reiterated the fundamental nature of the right to the free exercise of religion. Religious discrimination, overt or masked, is unconstitutional. 113 S.Ct. at 2227. Nothing in the Wyoming dissent suggests departure from the principle that Congress has §5 authority to protect recognized rights, such as the free exercise of religion, from discriminatory effects.

While RFRA may be novel in some respects, Congress' authority to enact accommodations of religion is not a novel concept. A legislature's authority to protect the exercise of religion from the burdens of neutral laws is well established. Walz v. Tax

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[21]The majority disposed of the issue before the Court on Commerce Clause grounds. 460 U.S. at 243.

Commission, 397 U.S. 664, 673 (1970); Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 338 (1987).

Congress' broad authority to relieve religious observers of the impact of neutral policies is clearly implicit in the case law of Title VII. Since 1972, Title VII of the Civil Rights Act of 1964 requires employers, including states, to make reasonable accommodations for the religious observance of their employees unless those accommodations would cause undue hardship. 42 U.S.C. §§2000e-2(a)(2), 2000e(j). These provisions operate where neutral rules of general applicability conflict with religious practices. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 87 (1977) (Marshall, J., dissenting); Ansonia Bd. of Ed. v. Philbrook, 479 U.S. 60, 76 (1986) (Stevens, J., dissenting).

Although Fitzpatrick, discussed above, involved a Title VII sex discrimination action, nothing in it suggests that the religious accommodation provisions are not similarly valid against state employers. Indeed, in Ansonia Bd. of Ed. v. Philbrook, 479 U.S. 60 (1986), the Court applied and interpreted the religious accommodation provisions of Title VII against a local public school board without questioning Congress' authority to enact them.

Several justices have affirmatively noted that the religious accommodation provisions of Title VII are constitutionally sound. Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 712 (1985) (O'Connor, J., with Marshall, J., concurring) (calling provisions "an anti-

discrimination law"); Edwards v. Aguillard, 482 U.S. 578, 617-18 (1987) (Scalia, J., with Rehnquist, C. J., dissenting)[22].

The religious accommodation provisions of Title VII, anti-discrimination provisions designed to curb the burdens inflicted by neutral work rules of all types in the employment setting, and applicable to state employers, has been a part of our law for a quarter of a century. While the Court has never squarely ruled that they are a valid exercise of Congress' §5 power, the Court's implicit understanding of their validity severely undermines Petitioners' challenge to RFRA in several respects:

1. Congress may enact religious accommodations as a means of reducing the discriminatory effects of formally neutral burdens on religion.

2. State, as well as private employers, have policies which impose substantial burdens on religious observers and Congress may correct the discriminatory effect of these burdens.

3. If Congress may intervene in the way states treat their own employees, it is inconceivable that Congress does not also have broad authority to require states to accommodate the religious practices of those they seek to regulate.

4. Title VII does not create a specific exemption. It applies any time the employer's practices and the employee's religious observance conflict.

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[22]Indeed, these opinions suggest that the only disputable issue on the constitutionality of Title VII lies in its application to private employers, since by its terms, the Free Exercise Clause is applicable only to governments. See, Estate of Thornton, 472 U.S. at 712 (O'Connor, J., concurring).

5. In order to determine whether a conflict between the employer's policy and the employee's religious practice exists, a court must determine that there was a religious practice and a conflict, precisely the kind of questions a court must consider under RFRA.

Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872 (1990), affirms these principles. Read concisely, Smith stands for the proposition that the Court in the first instance, that is in interpreting the Constitution, should not be the arbiter of social policy in determining the extent to which religious practices should be relieved from the burden of neutral laws. That determination appropriately lies with the political process. 494 U.S. at 890.[23] With RFRA, the political process has acted.

While Respondents deprecate an asserted lack of evidence supporting the need for broad-based religious exemptions from formally neutral laws, the Court's task is not to re-weigh the evidence in the Congressional record but merely "to perceive a basis upon which the Congress might resolve the conflict as it did." Morgan, 384 U.S. at 653. "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings." Fullilove, 448 U.S. at 478 (Burger, C.J., opinion).

Moreover, whatever may be the shortcomings of the several hundred pages of hearings and floor discussions on RFRA as a documentation of the need for it, this Court is

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[23] Smith did not limit permissible accommodation to specific exemptions. See, Flores, 73 F.3d at 1363. The Court provided an example of a specific exemption, for religious use of peyote, merely because that was the issue in the case. However, Title VII provides a general exemption across the board in the employment field and has survived for twenty-five years without question.

well aware of a further crucial point. "[S]ignificant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." United States v. Gainey, 380 U.S. 63, 67 (1965). As the representative branch, Congress has the duty to determine what is abroad in the land, and in discharging that duty its members bring far more to the table than what turns up in the record.

Here, the basis for Congress' action is readily apparent. The history of official discrimination of religious conduct has been noted by this Court.

> Governments have not always been tolerant of religious activity, and hostility toward religion has taken many shapes and forms--economic, political and sometimes harshly oppressive.

Walz, 397 U.S. at 673. Examples in this country are well known--Mormons were chased across the country. Jehovah's Witnesses were driven off the streets. Catholics were thwarted from setting up their own schools. See, Pierce v. Society of Sisters, 268 U.S. 510 (1925). The churches of African-Americans were suppressed and bombed. Overseas, the persecution of Jews in Nazi Germany is an horrific example of bigotry by bureaucracy. See, Lucy S. Dawidowicz, The War Against the Jews, 1933-1945, at Chs. 3-8, (1975).

Today's unfamiliar religions are likely to be non-Christian--Muslims or Buddhists, or "fusion" religions such as Santeria. Intentional discrimination against these "new" groups is rearing its ugly head. See, Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 113 S.Ct. 2217 (1993). Congress should not have to wait until bigotry erupts beyond control in order to protect the religious.

The trappings of the official bigotry which damaged the cause of equality in the early history of this country remain in the form of ignorant or indifferent stereotypes about what constitutes proper religious behavior. Insulated bureaucrats are especially vulnerable to regard with suspicion any unfamiliar practice or even the familiar practices of those who do not fit their standards. This leads them to unjustified conclusions such as that of Petitioners here, that the cross of a proved Christian may well be just another gang symbol which must be obliterated from the environment.

In enacting, RFRA, especially by such an overwhelming margin (unanimous voice vote in the House, 97-3 in the Senate), Congress has clearly shown that the people of this country have made the political and social choice that bureaucracies must be more respectful of everybody's religious practices.

The care that Congress took in exercising its duty of carrying out the will of the polity is clearly seen in the floor debate in the Senate on whether to exclude inmates from RFRA's protection. 139 Cong. Rec. S14350-68 (daily ed. Oct. 26, 1993); 139 Cong. Rec. S14461-68 (daily ed. Oct. 27, 1993). Senators drew on every source of information and balanced the need for more protection of inmates' religious rights with the cost of providing those rights. In considering this and other implications of RFRA, Congress was acting in precisely the way the Court in Smith, 494 U.S. at 890, thought that it should.

Moreover, Congress considered the sweeping nature of RFRA's scope and again, the political process was acting as Smith anticipated it would. In Smith, the Court recognized

that "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in . . . ." 494 U.S. at 890. Congress, as the ultimate arbiter of the competence of the political process, specifically found that piecemeal legislation, especially at the state and local level, was inadequate to address the problems created by burdens on religion. H.R. Rep. 103-88, Religious Freedom Restoration Act of 1993, at 6 (May 11, 1993); S. Rep. 103-111, Religious Freedom Restoration Act of 1993, at 8 (Jul. 27, 1993).

As Judge Posner noted,

> [r]eligions that have fewer members, especially if those members are drawn from the margins of society, do not have sufficient influence over the legislative process to avoid being flailed by the dinosaur's tail of legislation of general applicability, legislation not motivated by any animus toward minor sects but merely insensitive to their interests--possibly even oblivious to their existence.

Sasnett, 91 F.3d at 1021. Resp. App. at A1. In enacting RFRA, Congress was giving the unfamiliar and the downtrodden a meaningful right to exercise their religion in the light of official ignorance or indifference. This was precisely analogous to Congress' efforts to give Hispanic and African-American citizens a meaningful right to vote, as approved in Morgan and many other cases. In enacting RFRA, Congress was eliminating the intent requirement to require compelling interest scrutiny for the lingering evil of discriminatory effects, as it has done in other instances, with the Court's assent.

RFRA does not direct the states to spend any money nor does it compel any particular state action. Sasnett, 91 F.3d at 1022. Pet. App. at A8. RFRA does not require absolute accommodation even to severe burdens on religious practices. State actions that are the least restrictive means of advancing compelling interests will withstand scrutiny. 42 U.S.C. §2000bb-1(b). This is the same test applied against non-neutral laws under the Free Exercise Clause. Church of the Lukumi, 113 S.Ct. at 2233. As demonstrated by Congress' understanding that courts should continue to show substantial deference to prison authorities, see, Mack v. O'Leary, 80 F.3d 1175, 1180 (7th Cir. 1996), interpretation of compelling interest scrutiny under RFRA need not be entirely ignorant of the context.

Finally, Petitioners assert that RFRA violates the Separation of Powers Doctrine. Though the petition is not clear, we believe that they are surmising that this Court in Smith declared its incompetence to identify substantial burdens on religion.[24] However, RFRA does not require any inquiry into religion that courts have not been conducting for years. While courts may not inquire into either the "truth" or the "orthodoxy" of a particular belief, United States v. Ballard, 322 U.S. 78, 87 (1944), they have properly inquired into "whether the beliefs professed . . . are sincerely held and whether they are, in the [claimant's] own scheme of things, religious." United States v. Seeger, 380 U.S. 163, 185 (1965). Because it is the free exercise of "religion" that is protected by the First Amendment, such inquiries are inescapable. Wisconsin v. Yoder, 406 U.S. 205, 216 (1972). This Court has had no trouble dismissing religious claims as bizarre or incredible. Frazee v. Ill. Dept. of

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[24]RFRA does not, and does not purport to, redefine the Constitution.

Employment Security, 489 U.S. 829, 834 n. 2 (1989). The courts already consider burdens on religion in evaluating Title VII claims. RFRA requires no new inquiry.

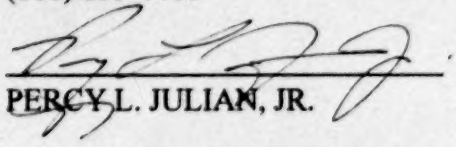
Both the Fifth Circuit in Flores, 73 F.3d at 1363, and the Seventh Circuit here, 91 F.3d at 1022, Pet. App. at A8, believed that the question of judicial competence did not render RFRA facially invalid. In doing so, they were relying on something at which Courts are very competent, the ability to interpret statutes according to the context. In this case, Christians were completely deprived of crosses. It is inconceivable that courts lack the competence to say that this is a substantial burden on the exercise of religion.[25]

CONCLUSION

For the reasons stated above the Respondents respectfully request that the Petition for Writ of Certiorari in this matter be denied.

Respectfully submitted,

*PERCY L. JULIAN, JR.
*Counsel of Record
STEVEN N. SCHULMAN
JULIAN & ASSOCIATES, S. C.
330 East Wilson Street
Madison, Wisconsin 53701-2206
(608) 255-6400



PERCY L. JULIAN, JR.

ATTORNEYS FOR RESPONDENTS

Dated: December 5, 1996

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[25]Petitioners have never raised an Establishment Clause issue and never appealed the Tenth Amendment issue. Those issues are expressly not raised here. Pet. at 4 n.1. Should the Court strike down RFRA on either ground in Flores, relief for Petitioners on those grounds would be inappropriate.

APPENDIX

APPENDIX

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A. CORRECTIONS OF ERRORS IN PETITIONERS' TRANSCRIPT OF DECISION OF COURT OF APPEALS

Respondents have discovered the following material errors in Petitioners' transcription of the Decision of the Court of Appeals. Words omitted from Petitioners' transcription are underlined.

The paragraph in Petitioners' Appendix commencing near the bottom of Page A6 and continuing to Petitioners' Page A7 should read:

> But we do not think that the scope of section 5 of the Fourteenth Amendment is limited to the strictly remedial aim evident in, for example, the ban on literacy tests. Rights are instruments for achieving concrete goals. The right to exercise one's religion free of government interference is an instrument for achieving the goal of religious freedom. That freedom is impaired by practices that do not, as well as by practices that do, infringe the constitutional right itself as it was authoritatively construed in the Smith case. Religions that have strong support among influential people have enough influence in the political process to be able to make sure that legislation is not passed that will inadvertently burden the observances required or encouraged by the religion. It is not an accident that we have Sunday closing laws rather than Thursday closing laws. Religions that have fewer members, especially if those members are drawn from the margins of society, do not have sufficient influence over the legislative process to avoid being flailed by the dinosaur's tail of legislation of general applicability, legislation not motivated by any animus toward minor sects but merely insensitive to their interests -- possibly even oblivious to their existence. The formal right of the members of these sects to the free exercise of their religion may have little practical value if observance is made onerous by general-purpose legislation. It seems to us that Congress can properly legislate under section 5 to make the formal right of religious freedom of persons who lack political power in individual states (yet are somehow able to form or benefit from the formation of an effective coalition to obtain legislative assistance at the national level) a meaningful right. The analogy to the empowerment theory of the Voting Rights Act (see, Katzenbach v. Morgan, supra., 384 U.S. at 652-653, 86 S.Ct. at 1724-1725) is close.

Prisoners, Christian or otherwise, are a good example of a group whose claims to be able to exercise a meaningful freedom of religion are unlikely to be heard in state legislatures.

See, Sasnett v. Sullivan, 91 F.3d 1018, 1021-1022 (7th Cir. 1996).

The full paragraph on Petitioners' Page A9 should read:

So the burden of justification is on the state; and it has not been carried. The regulation to which the defendants refuse to make an exception forbids the wearing of a crucifix even if it is too small or light to be a weapon (at least more of a weapon than a fist, a tooth, or a fingernail), too inexpensive to barter for a weapon, invisible because worn under clothing, and not a gang symbol or easily confused with one. The state allows prisoners to have rosaries, which could be used to strangle a fellow prisoner or a guard, and bans crucifixes even in correctional facilities wholly occupied by white-collar prisoners who do not belong to gangs or get into fights with each other or the guards. These features of the state's practice blast the case for regarding a ban on crucifixes and other religious jewelry as a serious and measured response to a concern with violence or a concern with gangs, legitimate and important as these concerns are. If particular types of religious jewelry (or religious jewelry of any type in the hands of prisoners reasonably believed prone to use it for purposes of weaponry, barter, or gang insignia) pose a genuine threat to prison security, the state can ban them; prison security is a compelling state interest. Id. at 1180.

See, Sasnett, 91 F.3d at 1022-1023.

B. CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I, states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, states in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * *
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Wisconsin Constitution, Article I, §18, states:

> The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.

C. WISCONSIN PROMULGATED REGULATIONS INVOLVED

Wisconsin Administrative Code, §DOC 309.61, states in pertinent part:

> **DOC 309.61 Religious beliefs and practice. (1)** GENERAL PRINCIPLES. (a) The department may not discriminate against an inmate or an inmate group on the basis of the inmate's or group's religious beliefs. The department recognizes that religious beliefs can provide support to inmates which may aid in their adjustment to institutional life and can lead to development of community ties which may aid in the inmates' successful reintegration into the community upon release.
>
> (b) Inmates may pursue lawful religious practices required or encouraged by their respective religious which are consistent with their orderly confinement, the security of the institution and fiscal limitations.
>
> (c) The department may not require inmates to participate in religious activities and may not maintain information concerning an inmate's religious activities other than records required for administrative purposes.
>
> (d) To the extent feasible, institutions may make facilities and other resources available to inmates for religious practices permitted under sub. (2).
>
> **(2)** INMATE PARTICIPATION IN RELIGIOUS PRACTICES. (a) An inmate who wants to participate in religious practices that involve others or that affect the inmate's appearance or institution routines shall submit a written request to the superintendent for permission to participate in specific religious practices. The request shall include a statement that the inmate professes, or adheres to, a particular religion and shall specify the practices of the religion in which the inmate requests permission to participate.
>
> (b) Upon receipt of the request, the superintendent, with the assistance of the chaplain or designated staff person with appropriate religious training, shall determine if the request is motivated by religious beliefs.
>
> (c) In determining whether the request is motivated by religious beliefs, the superintendent may consider:

1. Whether there is literature stating religious principles that support the beliefs; and

2. Whether the beliefs are recognized by a group of persons who share common ethical, moral or intellectual views.

(d) In determining whether the request is motivated by religious beliefs, the superintendent may not consider:

1. The number of persons who participate in the practice;

2. The newness of the beliefs or practices;

3. The absence from the beliefs of a concept of a supreme being; or

4. The fact that the beliefs are unpopular.

(e) If the superintendent determines that the request is not motivated by religious beliefs, he or she shall deny the request.

(f) If the superintendent determines that the request is motivated by religious beliefs, he or she shall grant permission to participate in practices that are consistent with orderly confinement, the security of the institution and fiscal limitations.

(g) The superintendent shall establish guidelines consistent with this section to govern inmate participation in religious practices and the guidelines shall be posted in a conspicuous place or distributed to all inmates.

* * *

(6) SYMBOLS. Inmates may wear garments, religious medals and other symbols required by their religion, unless this interferes with the identification of inmates or the security of the institution.

D. PETITIONERS' NEW INTERNAL MANAGEMENT PROCEDURE GOVERNING POSSESSION AND WEARING OF RELIGIOUS EMBLEMS

[Text Follows]

INTERNAL MANAGEMENT PROCEDURES

State of Wisconsin

Department of Corrections
Division of Adult Institutions

PROCEDURE NUMBER: DOC 309, I.M.P. #6-K

ORIGINAL EFFECTIVE DATE: 5/15/96

NEW EFFECTIVE DATE:

SUPERSEDES NUMBER: DATED:

CROSS REFERENCE:
ADMINISTRATIVE RULE: DOC 309.35; DOC 309.61
OTHER: DOC 309, IMP #1, #1-D, IMP #6, #6-A through #6-J
ACA:

PAGE NUMBER: 1 OF 3

SUBJECT: RELIGIOUS EMBLEMS

1. **Purpose:**

In a recent federal district court decision, the court declared that the internal management procedure prohibiting the wearing of religious jewelry violated inmates' rights under the Religious Freedom Restoration Act and enjoined the Department from enforcing DOC 309, IMP #1-D (jewelry prohibition) with respect to inmates who can demonstrate a sincere religious motivation for wearing such jewelry.

In order to comply with the court's order and while the court decision is being appealed by the Department, the Administrator of the Division of Adult Institutions and the wardens have developed this IMP to regulate the acquisition, possession, use, and disposal of religious emblems by inmates within correctional institutions.

2. **Permitted Religious Emblems:**

A. Definition: "Religious emblem" means an object which functions as a religious symbol and which is generally recognized by the inmate's religion as having religious significance. "Religious emblem" does not include Native American medicine bags which are controlled under DOC 309, IMP #6-H. Native American medicine bags may be worn in accordance with section 3.B.1. of this IMP.

B. Inmates shall be permitted to possess one religious emblem that is a symbol of their religious preference.

C. A religious emblem may not exceed 1 and 1/8 inch in length by 1 and 1/8 in width by 1/8 inch in depth nor weigh more than 1/2 ounce. The emblem shall be single thickness. The emblem shall be a single unit which cannot be disassembled, except it may have a single link to which a necklace can be affixed. The emblem may not be made of glass. The emblem may be worn around an inmate's neck on a single strand necklace which is made of nonmetallic, approved material. The length of the necklace may not exceed 26 inches when measured from end to end. In addition, the necklace material shall not exceed 1/16 inch in diameter.

D The total cost of a religious emblem and necklace shall not exceed $10.00, excluding taxes and shipping costs.

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INTERNAL MANAGEMENT PROCEDURES

State of Wisconsin

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OTHER: DOC 309, IMP #1, #1-D, IMP #6, #6-A through #6-J
ACA:

PAGE NUMBER: 2 OF 3

SUBJECT: RELIGIOUS EMBLEMS

3. **Procedure:**

Acquisition, possession, use, display, and disposal of religious emblems shall be consistent with Chapters DOC 303, 306, 308, 309, 310 and 311, Wisconsin Administrative Code and Internal Management Procedures promulgated thereunder, unless otherwise provided in this IMP.

A. **Acquisition**

(1) Inmates who wish to acquire a religious emblem may make a request in writing, setting forth their religious preference, the emblem requested, the justification for the emblem, a possible source or vendor for the emblem, and its cost. The request shall be made by using the attached form (Request for Religious Emblem, DOC-1585). The completed form shall be submitted to the institution chaplain or the center superintendent.

(2) The warden/superintendent or designee shall review the request and approve or deny it. If the request is denied, the reasons for the denial shall be stated in writing.

(3) If the request is approved, the religious emblem may only be acquired through an approved vendor or recognized religious leader.

(4) Inmates may not make more than two requests per calendar year.

B. **Possession and Use**

(1) Inmates may only wear and display a religious emblem on a necklace around their necks over their chests while in their cells, rooms, or the area designated in dormitories, the institution chapel, or other area designated for group religious meetings. In addition, inmates may wear a religious emblem as prescribed above while in transit between their cells, rooms, or the area designated in dormitories and the chapel or other approved area. Inmates may not display a religious emblem while in transit.

(2) Inmates may not use or display a religious emblem as a symbol of an unauthorized inmate group.

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INTERNAL MANAGEMENT PROCEDURES

State of Wisconsin

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Division of Adult Institutions

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ACA:

SUBJECT: RELIGIOUS EMBLEMS

(3) Possession of a religious emblem by an inmate is subject to standard consideration for safety and security. (For example: Inmates housed in a restrictive status with property limitations may have additional restrictions on the possession of religious emblems).

DEPARTMENT OF CORRECTIONS
Division of Adult Institutions
DOC-1585 (04/96)

WISCONSIN

REQUEST FOR RELIGIOUS EMBLEM

OFFENDER REQUEST - To be completed by the offender

OFFENDER NAME | DOC NUMBER | CELL / HOUSING UNIT

RELIGIOUS PREFERENCE

ITEM REQUESTED (Description)

JUSTIFICATION (Reason religious emblem is needed for practice of religion)

SOURCE OR VENDOR | COST

$

OFFENDER SIGNATURE | DATE SIGNED

DECISION - To be completed by institution staff

REQUEST APPROVED

☐ Yes ☐ No

IF DENIED, REASONS FOR DENIAL

AUTHORIZED SIGNATURE | DATE SIGNED

TITLE | INSTITUTION / CENTER

DISTRIBUTION: Original - Social Service File; Copy - Property; Copy - Chaplain; Copy - Security; Copy - Offender